Supreme Court, U.S.
FILED

02 1769 JUN 4 2003

No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MICHAEL JONES,

Petitioner,

v.

PORT TERMINAL RAILROAD ASSOCIATION,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Texas

---

PETITION FOR A WRIT OF CERTIORARI

TOM R. LETBETTER *
GEORGE PAYNE
GARRETT, LETBETTER & PAYNE, INC.
2500 Tanglewood, Suite 278
Houston, Texas 77063
(713) 783-2200

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

Whether the Safety Appliance Act, 49 U.S.C. Section 20302 (a) (2) applied to switchman, Michael Jones, when the railroad tank car handrail he was using to dismount the tank car broke causing him injury.

Whether the railroad tank car was "in use" under the Safety Appliance Act at the time of Michael Jones' injury.

LIST OF PARTIES

The caption of the case in the Court contains the names of all parties to the proceedings in the Supreme Court of Texas. The PORT TERMINAL RAILROAD ASSOCIATION, is an association virtually completely comprised of the Burlington Northern Santa Fe Railroad Company and the Union Pacific Railroad Company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
THE EVIDENCE	4
THE RULINGS BELOW	8
REASONS FOR GRANTING THE WRIT	9
I. CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS IN PRINCIPLE AMONG THE LOWER COURTS	9
CONCLUSION	21
APPENDICES	
A. Opinion of the Court of Appeals for the Fourth Supreme Judicial District of Texas	1a
B. Order/Judgment of the Fourth Supreme Judicial District of Texas Denying Motion for Rehearing	14a
C. Judgment of the Texas Supreme Court Denying Petition for Review of the Opinion/ Judgment of the Court of Appeals for the Fourth Supreme Judicial District of Texas	15a

TABLE OF CONTENTS—Continued

Page

D. Judgment/Order of the Texas Supreme Court Denying Motion for Rehearing of Denial of Petition for Review 16a

E. Opinion of the Court of Appeals for Supreme Judicial District of Texas in *Kenneth Synar vs. Union Pacific Railroad Company*, No. 12-99-00-428-C.V., Texas Sup. Ct. Case No. 011252, *writ denied* by the Texas Supreme Court, April 11, 2002. (opinion not published)..... 17a

TABLE OF AUTHORITIES

CASES Page

Affolder v. New York, C. & St. L.R.Co., 339 U.S. 96, 70 S. Ct. 509 (1949) 14
Alabama Great Southern R.R. Co. v. United States, 233 F. 2d 520 (5th Cir., 1956) 15
Atchison, T. & S,F, Ry. Co. v. Keddy, 28 F. 2d 952 (9th Cir., 1928) 15
Baltimore & O.R. Co. v. Title, 4 F. 2d 818 (6th Cir., 1925) 15
Carter v. Atlanta & St. Andrews Bay Ry. Co., 70 S. Ct. 226 (1949) 14
Chicago G.W.R RR.. Co. v. Schendel, 267 U.S. 287, 45 S. Ct. 303 (1925) 15
Chicago Junction Ry. Co. v. King, 169 F. 372 (7th Cir., 1909) 15
Chicago, M., St. P. & Pac. R. Co., v. Goldhammer, 79 F. 2d 272 (8th Cir., 1935) 14
Chicago, M., St. P & P. R.R. Co. v. Linehan, 66 F. 2d 373 (8th Cir., 1933) 15
Chicago, R.I. & Pac. Ry. v. Brown, 229 U.S. 317 (1913) 14
Deans v. CSX Transportation, Incorporated, 152 F.3d 326 (4th Cir., 1998) 15, 17
DeBiasio v. Illinois Central Railroad, 52 F. 3rd 678, (7th Cir., 1995, *cert. den.* 116 S. Ct. 1040 14
Delk v. St. Louis & San Francisco R. Co., 220 U.S. 580, 31 S. Ct. 617 (1911) 14
Erie R. Co. v. Russell, 183 F. 722 (2nd Cir., 1910) 14
Fort Worth & D.C. Ry. Co., v. Williams, 275 S.W. 415 (Tex. App., 1925, *cert. den.* 270 U.S. 661, 46 S. Ct. 356 14

TABLE OF AUTHORITIES—Continued

Page

Fort Street Union Depo Co. v. Hillen, 119 F.2d 307 (6th Cir., 1941) 14

Hahn v. Terminal Railroad Association of St. Louis, 355 S.W. 2d. 867, (S. Ct. Missouri, 1962) 15

Louisville & Nashville Railroad Company v. Layton, 243 U.S. 617, 37 S. Ct. 456 (1917) 14

McAdoo v. McCoy, 215 S. W. 870 (Tex. App., 1919, *cert. den.* 255 U.S. 575, 41 S. Ct. 447 14

Minn, St. Paul & S. S. M.R. Co., v. Popplar, 237 U.S. 369, 35 S. Ct. 609 (1915) 14

Monongahela Ry Co. v. Black, 235 F.2d 406 (4th Cir., 1956) 15, 17

Norfolk & Western Railway Company v. Ayers, 123 S. Ct. 1210 (2003) 15

O'Donnell v. Elgin, Joliet, & Eastern Ry. Co., 338 U.S. 384 (1949) 14

Phillips v. CSX Transportation Inc., 190 F. 3d 285 (4th Cir., 1999, *cert. den.* 120 S.Ct. 1269).. 15, 17

Port Terminal Railroad Association v. Jones, 82 S.W. 3d 126 (Tex. App, 2002) *writ denied* 1, 9

Robb v. Burlington Northern & Santa Fe Railway Company & Union Tank Co., 100 F. Supp. 2d 867, N.D, Ill, 2000) 15, 17

Roe v. Port Terminal Railroad Association, 620 S.W. 2d 870 (Tex. App, 1981, *error refused*, n.r.e.) 14

San Antonio & A. P. R. Co. v. Wagner, 241 U.S. 476, 36 S. Ct., 626 (1916) 14

Southern Ry. Co. v. Crocket, 234 U.S. 725, 34 S. Ct. 897 (1914) 14

Southern Ry. Co. v. Synder, 187 F. 492 (6th Cir., 1911) 14

TABLE OF AUTHORITIES—Continued

Page

St. Louis Southwestern Ry Co. of Texas v. Powell, 252 S.W. 268 (Tex. App., 1923, W.E.D.R.) 14

St. Louis S.F. & T Ry. Co. v. Ussery, 259 S. W. 274 (Tex. App., 1924, *writ. ref.*) 14

St. Louis Merchants' Bridge T. Ry. Co. v. Schuerman, 237 F. (8th Cir., 1916) 15

Synar vs. Union Pacific Railroad Company and Missouri Pacific Railroad Company, Tyler Court of Appeals Number 12-99-00428-C.V.; Texas Supreme Court No. 001252, *writ denied*. (unpublished opinion attached to Appendix) 8, 10, 18

Texas & N.O. R.R. Co. v. McGinnis, 130 Tex 338 (Comm. Of. App., *opinion adopted*; 109 S.W. 2d 160) 14

Texas & P. Ry. Co. v. Sprole, 202 S. W. 985 (Tex. App., 1918) 14

Texas & Pacific R. Co. v. Rigsby, 241 U.S. 33, 36 S. Ct. 482, (1916) 14

Trinidad v. Southern Pacific Transportation Co., 949 F. 2d 187 (5th Cir., 1991) 16

United States v. Cheseapeake & O. Ry Co, 213 F.748 (4th Cir., 1914) 16

United States v. International & G.N.R. Co., 174 F. 638 (5th Cir., 1909) 15

United States v. Pere Marquette R. Co., 211 F. 220 (W.D. Michigan, 1913) 15

Williams v. Norfolk Southern Railway Co., 126 F Supp. 2d 986 (W.D. Virg., 2000) 15, 17

TABLE OF AUTHORITIES—Continued

STATUTES	Page
Title 49, Sections 20301 and 20302, U.S.C.	2, 9
Title 28, Section 1257, U.S.C.	2
LAW REVIEW ARTICLE	
Law Today; Gone Tomorrow, Jennifer Adams; Baylor Law Review, Vol 53:3; Page 659	10

IN THE

Supreme Court of the United States

No. ___

MICHAEL JONES,

Petitioner,

v.

PORT TERMINAL RAILROAD ASSOCIATION,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Texas

PETITION FOR A WRIT OF CERTIORARI

Michael Jones, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Texas, entered in the above-entitled case on March 6, 2003, denying Motion for Rehearing on Denial of Petition for Review entered in the above cause on November 21, 2002, in which the Supreme Court of Texas denied Petition for Review of the Judgment of the Court of Appeals for the Fourth Supreme Judicial District of Texas.

OPINIONS BELOW

The May 8, 2002 opinion of the Texas Court of Appeals, whose judgment is herein sought to be reviewed, is reported at Port Terminal Railroad Association v. Jones, 82 S.W. 3d 126, and is reprinted in the separate Appendix to this Petition, pp. 1a.

The judgment of the Supreme Court of Texas dated November 21, 2002 denying Petition for Review and

judgment denying Petitioner's Motion for Rehearing on Denial of Petition for Review dated March 6, 2003, are reprinted in the Appendix to the Petition, pp 15a and pp 16a respectively.

JURISDICTION

The jurisdiction of this Court is involved pursuant to Title 28, Section 1257, U.S.C.A., in that the rights and privileges of Petitioner, Michael Jones, under the Federal Employers Liability, specifically, the Federal Safety Appliance Act, Title 49, U.S.C.A., Sections 20301 and 20302, have been denied by the judgment of the Court of Appeals for the Fourth Supreme Judicial District of Texas and the failure of the Texas Supreme Court to grant review and reverse the said judgment of the Texas Court of Appeals.

STATUTES INVOLVED

This case involves the "Safety Appliance Act" (FSAA) codified in Title 49, U.S.C.A., Sections 20301 and 20302 which provide as follows:

> **"§ 20301. Definitions and nonapplication**
>
> **(a) Definition.**—In this chapter, "vehicle" means a car, locomotive, tender, or similar vehicle.
>
> . . .
>
> **"20302. General requirements**
>
> **(a) General.**—Except as provided in subsection (c) of this section and section 20303 of this title, a railroad carrier may use or allow to be used on any of its railroad lines—
>
> (1) a vehicle only if it is equipped with—
>
> (A) couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles;

(B) secure sill steps and efficient hand brakes; and

(C) secure ladders and running boards when required by the Secretary of Transportation, and, if ladders are required, secure handholds or grab irons on its roof at the top of each ladder;

(2) except as otherwise ordered by the Secretary, a vehicle only if it is equipped with secure grab irons or handholds on its ends and sides for greater security to individuals in coupling and uncoupling vehicles;

(3) a vehicle only if it complies with the standard height of drawbars required by regulations prescribed by the Secretary;

(4) a locomotive only if it is equipped with a power-driving wheel brake and appliances for operating the train-brake system; and

(5) a train only if—

(A) enough of the vehicles in the train are equipped with power or train brakes so that the engineer on the locomotive hauling the train can control the train's speed without the necessity of brake operators using the common hand brakes for that purpose; and

(B) at least 50 percent of the vehicles in the train are equipped with power or train brakes and the engineer is using the power or train brakes on those vehicles and on all other vehicles equipped with them that are associated with those vehicles in the train."

STATEMENT OF THE CASE

This is a Federal Employers' Liability Act case brought under the Federal Safety Appliances Act portion of the statute by Michael Jones, Petitioner, who was injured in the course and scope of his employment with Respondent, Port Terminal Railroad Association.

THE EVIDENCE

Jones was hurt on October 16, 1997, while working as a foreman on a Port Terminal Railroad Association (P.T.R.A.) switching crew. (R.R. Vol. 2, p. 54) Jones is a switchman, *not* a carman or repairman. He reported to work at the P.T.R.A.'s Pasadena Yard and eventually took a train of inbound cars to an industry, Lubrizol, serviced by the P.T.R.A.. (R.R. Vol. 2, p. 58) When he arrived at Lubrizol, he uncoupled his locomotives from the inbound cars he brought from the Pasadena yard, and then began to prepare a group of outbound cars *released* by Lubrizol for transport back to the P.T.R.A. Pasadena Yard. (R.R. Vol. 2, pp. 58-61) The outbound cars had been left by Lubrizol em ployees on a track called the Lubrizol lead. Jones walked to the end of that group of cars, starting at the end of the cars farthest from where his engine would couple into the cars. He began to check his list of the cars, working his way towards the engine, and began to prepare the outbound cars for departure. At each car, he had to lace up the air hoses, release some of the handbrakes, visually inspect the safety appliances, and help the engineer put air in the brakes since the two engines were to be coupled to the outbound cars before departure. (R.R. Vol. 2, pp. 74-76)

The last people to have handled the cars before Jones were Lubrizol employees. (R.R. Vol. 2, p. 44) The last railroad to have inspected these cars was the P.T.R.A. whose carmen were to have inspected it at least four times between October 2, and October 8, 1997, when it was delivered to Lubrizol to be loaded (R.R. Vol. 9 pp. 16-18). After inspecting and lacing air hoses and releasing some handbrakes, Jones was injured when the handhold broke while he was dismounting one of the cars. (R.R. Vol. 2, pp. 70-76) Jones had to get up on the car with the bad handrail to release the brakes so that the engine and cars could immediately depart over to the spur track. (R.R. Vol. 2, pp. 71-74) Once Jones got air on all the

cars he would have immediately moved the cars with the defective handhold onto a siding at Lubrizol. Then his crew would have put the cars he had on the main line onto the Lubrizol track. (R.R. Vol. 2, pp. 61-62)

The handhold broke because of the poorly repaired, worn splice in the handhold. A handhold that breaks is a safety appliance violation. This was a running repair. Mowdy (carman). R.R. Vol. 2, pp. 118, 124-127)

The threads were rusted and worn. (R.R. Dumesnil, Vol. 4, pp. 224-226)

Jones needed to release the brakes. (R.R. Dumesnil, Vol. 4, pp. 11-12). The handholds are supposed to be secure. (R.R. Vol. 4, p. 24)

The broken handhold was supposed to have been saved, but is now missing. (R.R. Vol. 5, p. 42). The spliced threads were worn down. The handhold is supposed to be secure and this was a safety appliance (FSAA) violation. Smith (P.T.R.A. claim agent). (R.R. Vol. 5, pp. 32, 43, 45, 50 -52)

The handhold is not supposed to break, it can be dangerous if it does break, and a handhold like this is a safety appliance violation. The car should have been inspected by P.T.R.A. carmen on October 2, 1997. Running repairs could be done by P.T.R.A. in October of 1997. Jenkins (head man for P.T.R.A. with over 30 years of railroad experience). (R.R. Vol. 7, pp. 148-149, 150-153; 153-158, 159)

At the time of the injury Jones and the P.T.R.A. were engaged in work substantially affecting interstate commerce. (R.R. Defendant's Response to Plaintiff's Request for Admissions of Fact, Vol. 8, pp. 194-195). George Taylor was the head of safety appliance inspections and repairs (master mechanic) for the P.T.R.A. on October 16, 1997. He was the master mechanic for the P.T.R.A. from January 1, 1993 to September, 1998. He previously did the same work as

a mechanical supervisor for the Union Pacific, a member line of the P.T.R.A., for thirty-six (36) years. (R.R. Vol. 9, pp. 9-11)

Safety Appliances on the railroad include handrails. The type of handrail involved in the injury to Jones is "bad order". (Loose, not secure, about to come loose). (R.R. Vol. 9, pp. 15-16) This would be a safety appliance violation. It is the job of P.T.R.A. carmen to inspect such appliances, and if they are in need of repair, pull them out of service and repair them. (R. R. Vol. 9, p. 16) Mr. Taylor describes at least four occasions from October 2, 1997 to October 8, 1997, (October 8, 1997 was the date when the railroad car was delivered to Lubrizol) that the car should have been inspected by P.T.R.A. carmen for safety appliance violations. (R.R. Vol. 9, pp. 16-18)

Taylor testified that all the P.T.R.A. does is switching movements. It switches cars on its own tracks, from its tracks to an industry, puts together cars that are leaving the Port Terminal Railroad property, and puts together groups of cars that are leaving industries to go to P.T.R.A. tracks. It picks up cars from industries. The cars then go to wherever they are going in the country and are carried by the Union Pacific Railroad Company and the B.N.S.F. (P.T.R.A. member lines). It moves cars from these railroads to industries. The P.T.R.A. uses railroad cars in its business for switching. (R.R. Vol. 9, pp. 19-21)

In order to switch cars switchmen must release brakes, climb on and off railroad cars, climb on and off sill steps, climb on and off moving equipment, both release and set hand brakes, move drawbars, pull pins, couple cars together, and uncouple cars. Without these processes the P.T.R.A. cannot switch cars. (R.R. Vol. 2, pp. 36-44); and (R.R. Vol. 9, pp. 20-21)

Taylor stated that you cannot always tell if an end handrail such as the one that injured Jones is loose, broken, cracked, or insecure simply by just walking by and looking at it. The proper way to inspect this equipment is to pull on it and see if it is properly secured. In order to do this P.T.R.A. carmen are supposed to do their inspections by going up and pulling on the handrails. They are supposed to do this on every car they inspect. If the P.T.R.A. carman does not come up on the car and pull on the handrail, he is not doing his inspection properly. (R.R. Vol. 9, pp. 22-25, 56-57)

When railroad cars such as the one that injured Jones are delivered to an industry, it basically sits there except for being loaded and unloaded. He does not know if Lubrizol had carmen like the P.T.R.A. carmen prior to October 16, 1997. (R.R. Vol. 9, pp. 26-27)

Taylor describes the defect which caused the handrail to come loose as relating to worn threads. These threads do not wear down overnight. It takes months for them to wear down. If somebody had come up and shook that end handrail within a few days before October 16, 1997, they should had been able to identify that condition right then. (R.R. Vol. 9, pp. 26-31)

Safety appliances on railroad cars such as end handrails are supposed to be in proper condition under the F.R.A. and the Safety Appliance Act when the Port Terminal Railroad switches those cars. Never in the history of his railroad life or as a master mechanic on the P.T.R.A. had anybody like Mr. Jenkins or Mr. Smith (P.T.R.A. officers) told him "don't pay any attention to safety appliances when we are switching railroad cars". Nobody has ever told him that. It would be ridiculous to tell him that. (R.R. Vol. 9, pp. 33-34)

On the other hand Taylor has been told that when the P.T.R.A. is involved in switching operations that safety appliances must conform to Federal law and the Safety

Appliance Act. The requirements are in the Association of American Railroad books; the P.T.R.A. rule books, and the Federal Railroad Association books. He was supposed to follow those regulations every single day of his work life with the P.T.R.A.. (R.R. Vol. 9, pp. 33-34)

THE RULINGS BELOW

The case was tried to verdict, and the trial court entered final judgment for the Petitioner based on the jury's verdict under the F.S.A.A. The judgment was signed by Honorable John Coselli, Judge, 125th Judicial Court, Harris County, Texas. (C.R. 65-74 & 75-77) P.T.R.A. gave notice of appeal.

The parties in the Court of Appeals were Appellant, Port Terminal Railroad Association, and Appellee, Michael Jones. The case was transferred to the Court of Appeals for the Fourth Supreme Judicial of Texas at San Antonio. The majority opinion of the Court of Appeals was written by Honorable Sarah P. Duncan, who was joined by Honorable Paul W. Green in the majority opinion and held that the railroad car upon which Jones was injured was not "in use" under the F.S.A.A. A dissenting opinion was written by Honorable Phil Hardberger, Chief Justice. The opinion reversing the case for Respondent, P.T.R.A., was ordered published.

The San Antonio Court of Appeals and the Supreme Court of Texas had before them the unpublished opinion of the Tyler Court of Appeals in *Kenneth Synar v Union Pacific Railroad Company and Missouri Pacific Railroad Company*, Court of Appeals No. 12-99-00-428-CV, Tex. Sup. Ct. Case No. 011252, *writ denied*, April 11, 2002. The San Antonio Court of Appeals ignored the *Synar* opinion which clearly and unequivocally stated the correct law in safety appliance act cases dealing with switchmen who are switching cars. The *Synar* opinion correctly stated the Safety Appliance Act

law with regard to when a railroad car is "in use". The Texas Supreme Court denied writ in the *Synar* case, but refused to order publication of the *Synar* opinion. Therefore, railroads all over the country can take the position that *Jones v. PTRA* correctly states the "in use" law. Because the Texas Supreme Court refused to publish the *Synar* opinion which correctly stated the law, the correct law is now buried, and the published opinion in *Jones v. P.T.R.A.*, which incorrectly states F.S.A.A. law, has precedential value.

The opinion and judgment of the Court of Appeals were delivered and filed on May 8, 2002. Appellee's (Jones) Motion for Re-Hearing was received and filed on May 21, 2002. Appellee's Motion for Re-Hearing was denied on May 29, 2002.

The Texas Supreme Court denied Petitioner's (Jones) Petition for Review on November 21, 2002 and denied Petitioner's Motion for Review of such denial on March 6, 2003.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS IN PRINCIPLE AMONG THE LOWER COURTS

The judgment of the Texas Supreme Court should be reviewed by this Court because the opinion of the Texas Court of Appeals incorrectly stated a vital part of the ONLY system of compensation available to injured railroad workers. The Texas Court of Appeals, by improperly stating the law as to when a railroad car is "in use" on a railroad, divested tens of thousands of railroad workers of rights granted them by Congress, and enforced in hundreds of decisions for over a century. The pivotal issue in this case is the applicability of a Federal Statute, Title 49, Sec. 20301 and 20302, United

States Code, to all American railroad workers. This is not a case of erroneous fact findings or misapplication of a properly stated rule of law.

The San Antonio Court of Appeals and the Supreme Court of Texas had before them the opinion of the Tyler Court of Appeals in *Kenneth Synar v Union Pacific Railroad Company, Supra.* The San Antonio Court of Appeals ignored the *Synar* opinion which clearly and unequivocally stated the correct law in safety appliance act cases. The *Synar* opinion correctly stated the Safety Appliance Act law with regard to when a railroad car is "in use". The Texas Supreme Court denied writ in the *Synar* case, but refused to order publication of the *Synar* opinion, thus denying *Synar* precedential authority under Texas rules. Therefore, railroads all over the country can take the position that *Jones v. PTRA* correctly states the "in use" law. The *Synar* opinion and the *Jones* opinion cannot both be correct, but the Texas Supreme Court has allowed *Jones* to become the law without the facing the hard truth that the Court of Appeals in *Jones* misstated the law.

Attached to Petitioner's Petition for Review in the Texas Supreme Court was an article in Vol. 53 of the *Baylor Law Review* entitled *Law Today; Gone Tomorrow.* This article clearly outlined the injustices and unfairness of arbitrarily not publishing opinions. The article pointed out that unpublished opinions violate the United States Constitution because the failure to publish opinions can expand the judiciary beyond the meaning of judicial power in Art. III of the U.S. Constitution, and are destructive of principles of stare decisis upon which our legal system depends. At page 677, the author correctly wrote that "rules restricting the precedential value of unpublished opinions breed distrust for the judicial process." At page 678, she further wrote:

> "When people start to believe the system is arbitrary, the system loses all respect. The integrity of the court

> disappears and its officers lose the esteem of their positions. The judicial branch of government is considered the most prestigious branch, the branch with integrity, the branch where ordinary citizens go for justice. . . Judges' opinions are not supposed to be hidden from the public but are supposed to be freely disseminated so that people are aware of the decisions. Any rule that takes away from *stare decisis* takes away from the integrity of our judicial system because stare decisis "contributes to the integrity of our constitutional system of government, both in appearance and in fact."

The statutory purpose of the Safety Appliance Act; its stated legislative intent; and a century of well-reasoned case law, will be unjustifiably thrown aside if this Court does not grant this writ and state the correct law applicable to railroad workers injured by violations of the Federal Safety Appliance Act.

Tens of thousands of railroad workers, all over the United States, twenty-four hours a day, seven days a week, in all kinds of weather, switch railroad cars. The terminal railroads, such as the Port Terminal Railroad Association in this case, do nothing but switch railroad cars. Uncounted thousands of railroad cars are switched every day by such terminal railroads. The uncontroverted record in this case shows that the Port Terminal Railroad Association has no use for railroad cars other than to switch them. Its only use for the railroad cars is to switch them. The only work for railroad workers on the Port Terminal Railroad Association and such railroads involves switching cars. This is their only use. If this case was not so important, it would be laughable to think that terminal railroads all over America who do nothing but switch railroad cars are not "using" them under the Safety Appliance Act. Railroad workers have no system of compensation other than the Federal Employers' Liability Act, and the Safety Appliance Act is a vital and intergal part of that system of compensation. Anyone who has ever handled

an FELA case knows that it is often impossible to trace who did what to what railroad car when and at what point to cause a safety appliance violation, such as a broken handhold, to happen. Congress knew this 100 years ago. The courts have known it for one hundred years. Railroads have known if for one hundred years. It is why railroads workers must have the protection of the Safety Appliance Act.

In 1893 Congress, at the urging of the President, passed the Federal Safety Appliance Acts (FSAA) (also called "SAA") to protect switchmen from insecure handholds, grabirons, sill steps, ladders and inefficient hand brakes and couplers, no matter where the injury occurred or what the switchman was doing. The Federal Safety Appliance Act (FSAA) provides that a railroad may use or allow to be used on its line only "vehicles", defined to include railroad cars, that are equipped with secure grab irons or handholds on ends and sides for greater security *to individuals in coupling and uncoupling vehicles*. (Emphasis ours). All employees were protected at all times from the FSAA violations unless the bad car was already at the railroad maintenance facility to be inspected, serviced or repaired. As shown by the debates in Congress and legislative history, the main group of employees Congress was legislating to protect were *switchmen* doing switching work.

Thousands of Federal Circuit, United States Supreme Court, Federal District Court and State decisions held that the provisions of the FSAA regarding hand holds, grabirons, sill steps, ladders, brakes and couplers protect switchmen no matter where the injury occurs or what the switchmen is doing at the time of his injury unless the car was already at the railroad maintenance facility. The courts always held that the switchmen were protected from unsafe equipment. The railroad car in violation of the FSAA was held to be "in use" when: (1) the switchman was not engaged in coupling or uncoupling; (2) the car was *not* in motion; (3) the car was not

on a main track; (4) the car was by itself when the switchman was injured.; and a multitude of other situations. The FSAA violation existed if a covered appliance on the car ("vehicle") did not perform properly.

The legislative reasoning and intent for creating the handhold provisions of the Safety Appliance Act as affirmed in numerous Supreme Court cases and lower court opinions rest in the following clearly established principles over the last one hundred five (105) years: (1) there is an absolute duty of the railroad companies to provide secure handholds to switchmen no matter what the position the switchmen is in at the time of the accident and no matter what act he is engaged in at such time; (2) courts should liberally construe the handhold provision to effectuate the prime purpose of Congress, to protect railroad switchmen and others by requiring use of safe equipment; (3) the duty is absolute, not excused by any showing of care, however assiduous; (4) primary object of act is to promote the public welfare by securing the safety of employees and travelers; (5) it matters not whether the car is on the main line or switching track; (6) the statute should be liberally construed so as to give a right for *every* injury, the cause of which was a failure to comply with a requirement of the act; and (7) courts will *not* construe the handhold provisions in such a way as to lead to results which are *absurd, oppressive*, and *unjust* and beyond the scope and purpose of the statute. (Emphasis ours)

Shortly after the original FSAA handhold provision passed, railroads tried to say that the handhold act *did not* apply because the car was not in use: (1) if the employee was not engaged in coupling or uncoupling; (2) if the car was *not* in motion; (3) if the employee was *not* between the cars; (4) if a switching crew was taking a "bad order" car to the shops; (5) if the "bad order" car had been set out on a track with other cars to be cut out of the cars; (6) if the car was *not* on a main line track; (7) if the car was not going to another state; (8) if

employee was knocked off another train other than the car with the bad grab iron; (9) if the switchmen is trying to repair the defect on the track; (10) if the jury finds the handhold was safe for its intended use; and (11) if a State statute covered the handhold defect. All of those railroad theories have been rejected for nearly 100 years: *Louisville & Nashville Railroad Company v Layton*, 243 U.S. 617, 37 S. Ct. 456 (1917); *Roe v. Port Terminal Railroad Assoc., Supra*; *Texas & Pacific Railway Company v. Rigsby*, 241 U.S. 33, 36 S. Ct. 482 (1916). *McAdoo v. McCoy*, 215 S.W. 870 (Tex. App., 1919, *cert. den.* 255 U.S. 575, 41 S. Ct. 447). *Affolder v. New York, C. & St. L.R. Co.*, 339 U.S. 96, 70 S. Ct. 509 (1949). *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 70 S. Ct. 226, (1949). *Chicago, R. I. & Pac. Ry. v. Brown*, 229 U.S. 317 (1913). *O'Donnell, Administratrix v. Elgin, Joliet & Eastern Ry Co.*, 338 U.S. 384, (1949). *San Antonio & Aransas Pass Railway Co. V. Wagner*, 241 U.S. 476 36 S. Ct. 626 (1916). *Texas & P. Ry Co. v. Sprole*, 202 S. W. 984 (Tex. App., 1918). *St. Louis S.W. Ry. Co of Texas v. Powell*, 252 S. W. 268, (Tex. App., 1923, W.E.D.R.). *St. Louis S.F. & T. Ry Co v Ussery*, 259 S.W. 275 (Tex. App., 1924, writ ref.). *Texas & New Orleans Railroad Co. v. McGinnis*, 130 Tex 338 (1937, Comm. of App. *Fort Worth & D.C. Ry Co. v. Williams*, 275 S.W. 415 (Tex. App., 1925, *cert. den.*, 270 U.S. 661, 46 S. Ct, 356). *DeBiasio v. Illinois Central Railroad*, 52 F. 3rd. 678 (7th Cir. 1995, *cert. den.* 116 S. Ct. 1040). *Erie R. Co. v. Russell*, 183 F. 722 (2d. Cir., 1910. *Chicago, M. St. P & Pac. R. Co v. Goldhammer*, 79 F. 2d 272 (8th Cir. 1935). *Southern Ry Co v. Snyder*, 187 F. 492 (6th Cir., 1911). *Great Northern Ry. Co. v. Otos*, 239 U.S. 349, 36 S. Ct 124 (1915); *Southern Ry. v. Crocket*, 234 U.S. 725 (1914); *San Antonio Ry. v. Wagner*, 241 U.S. 476 (1916); *Minn St. Paul & S.S. M. R. Co. v. Popplar*, 237 U.S. 369, 35S. Ct. 609 (1915); *Delk v. St. Louis & San Francisco R. Co.*, 220 U.S. 580, 31 S. Ct. 617 (1911); *Southern Ry. Co. v. Snyder*, 187 F. 492 (6th Cir. 1911); *Fort Street Union Depo Co. v. Hillen*, 119 F.2d 307

(6th Cir. 1941); *Baltimore & O.R. Co. v. Tittle*, 4 F. 2d 818 (6th Cir. 1925); *St. Louis Merchants' Bridge T. Ry Co. V. Schuerman*, 237 F. 1 (8th Cir. 1916); *Atchison, T. & S. F. Ry. Co. v. Keddy*, 28 F. 2d 952 (9th Cir. 1928); *Chicago Junction Ry. Co. V. King*, 169 F. 372 (7th Cir. 1909); *Chicago, M. St. P. & P. R. R. Co. v. Lineham*, 66 F. 2d 373 (8th Cir. 1933). *Chicago, G.W. RR. Co. v. Schendel*, 267 U. S. 287, 45 S. Ct. 303 (1925). *Monogahela Ry Co. v. Black*, 235 F. 2d. 406 (4th Cir., 1956). *United States v. International & G.N.R. Co.*, 174 F. 638 (5th Cir., 1909). *Alabama Great Southern R. R. Co. v. United States*, 233 F. 2d. 520 (5th Cir., 1956). *United States v. Pere Marquette R. Co.*, 211 F. 220 (W.D. Michigan, 1913). *Hahn v. Terminal Railroad Association of St. Louis*, 355 S.W. 2d. 867 (S. Ct. Missouri, 1962); *Robb v. Burlington Northern & Santa Fe Ry. Co.*, 100 F. Supp. 2d. 867 (N.D. Ill., 2000); & *Williams v. Norfolk Southern Railway Co.*, 126 F. Supp. 2d. 986 (W.D. Virginia, 2000).

This court recently, in *Norfolk & Western Railway Company v. Ayers*, 123 S.Ct. 1210, acknowledged that "Congress designed the FELA to shift part of the 'human overhead' of doing business from employees to their employers. (p. 1217) At page 1225, the Court noted that "several of the F.E.L.A.'s provisions expand a railroad's liability by abolishing common-law defenses that limited employees' ability to recover against their employers."

No Court in the land attempted to change one hundred five (105) years of handhold FSAA violations law until the Fourth Circuit decisions in *Deans v. CSX Transportation, Incorporated*, 152 F.3d 326 (4th Cir., 1998 and *Phillips v. CSX Transportation Inc.*, 190 F. 3d 285 (4th Cir., 1999, cert. den. 120 S. Ct. 1269. The Fourth Circuit took the FSAA air brake law dealing with a *"train in use"* and *held* the handhold act does *not protect* a switchman when he is involved in switching operations. For whatever reason, it departed from its own reasoning in *Monongahela*, *supra*, and other cases.

Deans was a conductor who was injured releasing a handbrake. The Fourth Circuit tried to use *Trinidad v. Southern Pacific Transportation Co.*, 949 F.2d 187 (5th Cir. 1991), which is an "air brake", "TRAIN in use" case, and not a (vehicle) handhold case, to justify its false factors test. Of course, the air brake law does *not* apply most of the time in switching cars because the air brakes *must* deal with a "*train*," *not* one car. (Air is used when the cars are moved in groups as a train) If the cars' air hoses are not coupled to the engine, it is physically impossible for air to be on the railroad cars. In switching operations, the air hoses must be taken apart constantly to switch cars into different tracks.

In *Trinidad, Supra*, a carmen was injured while inspecting the air brake system before the "train" was turned over to the engineer and conductor to leave with the train. This case had nothing to do with a handhold on a single car. The Court stated the act (air brake, NOT handhold) provision did *not* protect the employee when *'trains"* are involved in switching operations. *Never* did the Court say a "car" handhold has the same "in use" requirement as a "Train" under the train air brake provision. The court stated that when dealing with the air brakes -Safety Appliance Act, the "train" must be operating and not being put together. *Trinidad, supra*, did *not* attempt to change the clearly established law that hand holds MUST be secure for switchmen in switching operations. (See the statute printed above for a comparison of the vehicle (railroad car) provisions and the train air brake provisions.)

The Fourth Circuit, in *United States v. Chesapeake & O. Ry. Co.*, 213 F. 748, (4th Cir., 1914) ruled in a case in which a railroad car in violation of the FSAA was loaded and switched instead of being repaired promptly. The Court, at pages 750, 751, 752, stated its analysis and holding:

> ". . . . Did Congress by this proviso intend to afford no protection to the employees while cars were being operated within the yard limits?

> "It is a matter of common knowledge that the danger incident to coupling cars is as great, if not greater, in switching yards than on the line between stations.

In *Robb v. Burlington Northern & Santa Fe Ry.Co., Supra*, the court rejected the railroad's reliance on *Phillips*. The court stated at page 870, that "the restriction that a 'train' must be 'in use' does not extend to the hand brake requirements for 'vehicles' of Sec. 20302 (a)(1)(B)." When the railroad claimed that "if a train is not in use then the FSAA as a whole is inapplicable," the Judge correctly stated that the railroad's position was *absurd.*

In the recent case of *Williams v. Norfolk Southern Railway Co., supra*, a Federal District Judge in *the Fourth Circuit* reviewed a prior opinion of the Federal Fourth Circuit (*Monogahela, supra*;) and stated:

> "Indeed, the fact of *Monongahela* could not more closely mirror this case. As in that case, Plaintiff was injured while assembling a train from filled coal cars that occupied side tracks alongside the coal company. The fact that the train was not completely assembled did not bar application of the hand brake provisions of the FSAA in *Monongahela*; thus, it should not bar its application here. For these reasons, I find that the railcar on which Plaintiff injured himself was "in use" for the purposes of the FSAA."

Misstatements of the law in *Deans* and *Phillips* will lead to more bad law unless the *Deans* and *Phillips* "tests" are clearly and unequivocally refuted by granting a writ in this case. All the P.T.R.A. and many other railroads do is switch cars. The illogical result of the majority opinion of the court below is to eliminate the FSAA on switching railroads all over America. Does anyone really believe Congress intended such treatment of its laws?

The summary reverence to the faulty reasoning of the Federal Fourth Circuit by the Texas Court of Appeals and

Texas Supreme Court is virtually incomprehensible in light of the opinion of the Tyler Court of Appeals in *Synar, Supra*. The *Synar* opinion clearly, articulately, unequivocally and in great depth, points out, that the tortured tests of the *Phillips* and *Dean* cases have no business being applied to determine when a car is "in use" in a switching operation such as in the case before this Court. The Texas Supreme Court correctly denied writ in *Synar*, and clearly should gave granted a writ in this case before this court.

In *Synar v. Union Pacific Railroad Company, Supra*, the Twelfth Court of Appeals correctly stated:

1. "As we shall explain we conclude that *Phillips* is based on a faulty premise."
2. "Air-brakes and hand brakes are addressed separately within the FSAA."
3. "Thus the FSAA makes a distinction between trains, which are stopped with the use of air-brakes, and cars, which are stopped with the use of hand brakes."
4. "The *Phillips* court broadly stated that "the FSAA does not apply to train cars involved in switching operations" and cited three cases, none of which stand for that proposition."
5. "We should not imply that the hand brake provision does not apply to switching operations merely because the air-brake provision does not."
6. "Finally, the *Phillips* court relied on *Trinidad*, a Fifth Circuit case also applying the air-brake provisions of the FSAA."
7. "The *Trinidad* court did not comment on the applicability of the hand brake provision to any given situation."
8. "In short, the cases relied on in *Phillips* to support its holding that switching operations do not fall within the definition of "in use" under the FSAA do not support that holding."

9. "Significantly, the purpose of the FSAA is to promote the safety of employees and travelers and the statute should be liberally construed as a safety measure."

10. "It is because safety in the yard during switching operations requires efficient hand brakes that Congress passed the hand brake provision."

11. "As other courts have considered during discussions of this issue, if the "efficient hand brakes" provision of the FSAA does not apply during switching operations, it is difficult to see when it would ever apply. *Williams v. Norfolk So. Ry. Co.*, 126 F. Supp. 2d 986, 992 (W.D. Va. 2000); *Robb*, 100 F. Supp. 2d at 870."

12. "On the contrary, the Supreme Court has held that a railroad employee's designation as yard or switching crew was not material. The controlling test of the statute's application lies in the nature of the work done. *Chicago, Burlington & Quincy R.R. Co.*, 237 U.S. at 413, 35 S. Ct. at 636"

13. "Generally speaking, the cars and railroad employees in the yard are exposed to the hazards which the provision requiring efficient hand brakes is intended to avoid or minimize."

14. "Efficient hand brakes are a necessary safety measure in rail yards."

15. "We conclude that the hand brake provision of the FSAA applies to the switching activities Synar was engaged in when injured."

16. "The attempt to exempt switching activities was actually an attack on the sufficiency of the evidence to prove the cars on which Synar was injured were "in use" at the time of the injury."

17. "As switching operations constitute "use" under the FSAA, the record shows there is more than a scintilla of competent evidence to support the jury's finding in answer to question four."

18. "Accordingly, the trial court erred in disregarding the jury's affirmative answer to question four based on the reasoning that the FSAA does not apply to switching operations."

19. "Because the trial court erred in disregarding the jury's answer to question four, we reinstate the jury's affirmative answer finding UP liable under the FSAA."

20. "We would modify the trial court's judgment to reinstate the jury's finding on the FSAA issue thus allowing recovery for a violation of the FSAA, making the statutory thirty percent reduction inapplicable."

CONCLUSION

The path to this crossroad for determination of the continued efficacy of the FSAA is easily traced. The Federal Fourth Circuit in *Phillips* and *Deans* applied the *Trinidad* language in an air brake train safety appliance case to railroad car safety appliance cases. Unless this Court grants a writ and corrects this error, congressional intent; a century old statute; thousands of cases; and the rights of tens of thousands of railroad workers are going down the drain; and the railroad industry will have judicially destroyed railroad workers compensation legislation for railroad workers without substituting for its existence.

For the foregoing reasons, the Petitioner respectfully prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

TOM R. LETBETTER *
GEORGE PAYNE
GARRETT, LETBETTER & PAYNE, INC.
2500 Tanglewood, Suite 278
Houston, Texas 77063
(713) 783-2200

* Counsel of Record

APPENDICES

APPENDIX A

COURT OF APPEALS OF TEXAS,
San Antonio

[Filed May 8, 2002]

No. 04-01-00042-CV

PORT TERMINAL RAILROAD ASSOCIATION,
Appellant,

v.

MICHAEL JONES,

Appellee.

Rehearing Overruled May 29, 2002

OPINION

Port Terminal Railroad Association appeals the judgment in favor of Michael Jones in his suit under the Federal Employer's Liability Act for violations of the Safety Appliance Act. We hold there is no evidence of a precondition of liability—that the train was "in use" at the time of the accident—and therefore reverse the trial court's judgment and render judgment in the PTRA's favor.

FACTUAL AND PROCEDURAL BACKGROUND

On the afternoon of the accident, Michael Jones, a railroad switchman. for PTRA, was assigned to drop off a string or "cut" of railroad cars at three facilities (Lubrizol; Grace, and Diamond Deer Park), pick up each facility's loaded cars, and take the cars to the Pasadena Yard, where they would be coupled with other cars and an engine to form a train. Before Jones could pick up a cut of cars, however, he had to release the hand brake on each car, visually inspect the safety

appliances (steps, handholds, and rails), lace or "cut in" the compressed air supply lines, perform an air brake test, and couple his engine to the cars.

Jones first went to Lubrizol, working first on the car furthest from where the engine would be coupled. When he was approximately half way through the cut, he fell from the brake platform of a railcar when the handhold broke. At that point, the engine had not been coupled to the cars, nor had an air brake test been performed. These steps were not performed until Jones and his crew first dropped off the cars at the other two facilities, performed the same predeparture procedures on their "outbound" rail cars, and returned with those cars to pick up the "outbound" cars at Lubrizol.

After the accident, Jones sued PTRA for negligence and violations of the Safety Appliance Act. The jury found that the broken handhold, but not negligence, was a proximate cause of Jones' injuries. The trial court rendered judgment on the verdict, after first ruling that the train was "in use" at the time of the accident.

STANDARD OF REVIEW

Because the material facts are undisputed, whether the train car was "in use" at the time of the accident is a question of law. *Deans v. CSX Transp, Inc.*, 152 F.3d 326, 329 (4th Cir.1998). We review questions of law *de novo. See Mitchell Energy Corp. v. Ashworth,* 943 S.W.2d 436, 437 (Tex.1997); *Pony Express Courier Corp. v. Morris*, 921 S.W.2d 817, 820 (Tex.App.-San Antonio 1996, no writ).

DISCUSSION

"The Safety Appliance Act imposes strict liability on railroads for violations of the Act's safety standards." *Trinidad v. S. Pac. Transp. Co.*, 949 F.2d 187, 188 (5th Cir.1991). However, strict liability does not attach unless the train is "in use" at the time of the accident. *See Brady v.*

Terminal R.R. Assn., 303 U.S. 10, 13, 58 S.Ct. 426, 82 L.Ed. 614 (1938). To determine whether a train is "in use," the federal circuit courts have developed competing tests. For instance, in *Trinidad,* the Fifth Circuit held the train was not "in use" when "it had not been released following inspection because the inspection was not yet complete." *Trinidad*, 949 F.2d at 189. This "bright line" test was rejected as "too facile" by the Fourth Circuit. *Deans*, 152 F.3d at 329. Instead, "to determine whether a train is 'in use' for purposes of the FSAA, the primary factors [the Fourth Circuit] consider[s] are where the train was located at the time of the accident and the activity of the injured party." *Id.; see McGrath v. Consol. Rail Corp.*, 136 F.3d 838, 842 (1st Cir.1998). In *Deans*, a conductor was injured while attempting to release a stuck hand brake and before conducting a predeparture air brake test *Deans*, 152 F.3d at 328. The court held the train was "in use" because "it already had its engine coupled to it and was standing on a track in the rail yard in preparation for imminent departure"; the injured conductor "was part of the transportation crew and in no way involved in the repair or maintenance of the train. *Id.* at 330. That the predeparture air brake test had not yet been conducted was of no practical significance since it could have been performed before the hand brakes were released. *Id.*

PTRA contends that both tests mandate reversal, and rendition of judgment in its favor in light of the facts adduced at trial. We agree. Under the "bright line" test adopted by the Fifth Circuit, the Safety Appliance Act clearly does not apply. Jones's testimony establishes his predeparture inspection of the Lubrizol cars was not complete at the time of the accident. The Fourth Circuit's test leads to the same result. Jones's testimony establishes the cars were not in the yard, but on the Lubrizol lead; his predeparture inspection of the cars had not been completed; the engine had not yet been coupled to the cars; and the air brake test had not yet been performed. Indeed, neither of the latter two steps would be accomplished

for a number of hours. In short, the departure of the cars was far from "imminent." *See Phillips v. CSX Transp., Inc.*, 190 F.3d 285, 289-90 (4th Cir. 1999) (holding train was not in use, even though train was assembled and sitting in the yard, in part because "the train was about to be uncoupled from its engine, its handbrakes were being engaged, and it had yet to undergo its predeparture inspection"), *cent. Denied*, 529 U.S. 1004, 120 S.Ct. 1269, 146 L.Ed.2d 218 (2000). We therefore hold the train was not "in use" when Jones's accident occurred.

CONCLUSION

Because the train was not "in use" when Jones's accident occurred, regardless of whether we employ the Fifth or Fourth Circuit's test for "in use," the Safety Appliance Act does not apply. Consequently, we reverse the trial court's judgment and render judgment in favor of Port Terminal Railway Association.

PHIL HARDBERGER, *Chief Justice*, dissenting.

The majority reverses the trial court's judgment based on its conclusion that the train was not "in use" when Jones was injured. I respectfully dissent.

In 1908, Congress enacted the Federal Employers' Liability Act ("FELA")' in response to the physical dangers railroad workers faced that resulted in the death or maiming of thousands of workers each year. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 542,114 S.Ct. 2396, 129 L Ed.2d 427 (1994). FELA was intended to provide a federal remedy that "shifted part of the 'human overhead' of doing business from employees to their employers." *Id.* "[G]eneral congressional intent was to provide liberal recovery for injured workers." *Kernan v. American Dredging Co.*, 355 U.S. 426, 432, 78 S.Ct. 394, 2 L.Ed.2d 382 (1958). To further this humanitarian purpose and Congress's remedial goal, the United States Supreme Court has liberally construed FELA. *Gottshall*, 512 U.S. at 543, 114 S.Ct. 2396.

A railroad is strictly liable under FELA for violations of the Safety Appliance Act ("SAA"). *Houston Lighting & Power Co. v. Atchison, Topeka, & Santa Fe Ry. Co.*, 890 S.W.2d 455, 457 (Tex.1994). The SAA provides that "a railroad carrier may use or allow to be used on any of its railroad lines a vehicle only if it is equipped with . . . secure handholds or grab irons." 49 U.S.C. § 20302(a). A railcar is a vehicle. 49 U.S.C. § 20301(a). Accordingly, a violation of the SAA occurs if a carrier allows a railcar that is not equipped with secure handholds to be used.

The stated purpose of the "in use" limitation is to give railroads the opportunity to inspect for and correct safety appliance defects before being exposed to the SAA's strict liability for such defects. *Phillips v. CSX Transp., Inc.*, 190 F.3d 285, 288 (4th Cir.1999). In keeping with this purpose, whether the railroad has completed its inspection is a critical

factor in determining whether a railcar is in use. *See, eg.*, *Angell v. Chesapeake & Ohio Ry. Co.*, 618 F.2d 260, 261 (4th Cir.1980) (car in use when all servicing, maintenance, and inspection work had been completed and injury occurred post-inspection during coupling process); *Monongahela Ry. Ca v. Black*, 235 F.2d 406, 408 (4th Cir.1956) (car in use when moved to side track for loading) *Baltimore & O.R. Co. v. Tittle*, 4 F 2d 818, 819 (6th Cir.1925) (car in use when being prepared for coupling). In other cases involving a train arriving at a particular location, the critical factor is whether the train.was withdrawn from service which would give the railroad a new opportunity to inspect the train. *See, e.g.*, *Brady v. Terminal R. Ass'n*, 303 U.S. 10, 13, 58 S.Ct. 426, 82 L.Ed. 614 (1938) (car in use because not withdrawn from service); *Chicago Great Western R. Co. v. Schendel*, 267 U.S. 287, 291-92, 45 S.Ct. 303, 69 L.Ed. 614 (1925) (car in use where use, movement and hauling had not ended); *Great Northern Ry. Co. v. Otos*, 239 U.S. 349, 351, 36 S.Ct. 124, 60 L.Ed. 322 (1915) (car in use when merely subjected to delay); *Fort St. Union Depot Co. v. Hillen*, 119 F.2d 307, 312 (6th Cir.1941) (train not withdrawn from service at time employee was injured). The consistent pattern in these cases, is to exclude from the SAA's coverage "only such functions as are necessary to detect and correct those defective conditions for which absolute liability will be imposed." *Angell*, 618 F.2d at 262.

Although some common factors are considered in each case, the cases primarily demonstrate that "[t]he inquiry into whether a train was 'in use' under the [SAA] is neither simple nor straightforward." *Paul v. Genesee & Wyoming Industries, Inc.*, 93 F.Supp.2d 310, 316 (W.D.N.Y.2000). "The inquiry is challenging because precedent on the issue tends to be very fact-specific, and because there are generally no bright lines that demarcate when a train is in use and when it is not." *Id.* (citations omitted).

In an effort to provide some standard principles to guide the "in use" analysis, two basic "tests" have developed in federal law with regard to the "in use" requirement. The "bright line" test established by the Fifth Circuit in *Trinidad v. Southern Pac. Transp. Co.*, 949 F.2d 187 (5th Cir.1991), and the "totality of the circumstances" test established by the Fourth Circuit in *Deans v. CSX Transp., Inc.*, 152 F.3d 326 (4th Cir.1998).

In *Trinidad,* a carman, Jesus Trinidad, "was performing the final steps of a routine brake inspection" in accordance with federal regulations that require the brakes to be tested for air leaks after a train is made up. 949 F.2d at 188. During the inspection, Trinidad detected and repaired an air leak in the brake system of one of the railcars. *Id.* Trinidad drove his truck to the head of the train to inform the engineer. *Id.* As Trinidad walked across a set of tracks between his truck and the train he had inspected, he was hit by a "cut" of cars being moved up the track. *Id.* Trinidad argued that the air leak was a legal cause of his injury because he was injured while attempting to notify the engineer of the air leak. *Id.* The air leak was an alleged defect under the SAA *Id.*

The Fifth Circuit noted that the SAA is only applicable if a train is "in use," "running," or being "hauled." Id. The Fifth Circuit asserted, "Generally, courts have not applied the [SAA] to trains involved in switching operations—those procedures by which the cars and engines are uncoupled, moved, and reassembled—even though such trains are in motion. Trains that have completed the switching process, and departed for their destinations, however, are subject to the [SAA's] requirements, whether or not they are actually in motion when the defect occurs." *Id.* at 188-189 (citations omitted). "[T]he distinction between switching and train operations established in older cases remains relevant in determining whether a train is 'in use' or 'being run' for the purposes of the [SAA]. The initial inspection of a train,

however, appears to fall squarely between the switching and post-departure categories." *Id.* at 189. The Fifth Circuit noted that at the time of the accident in the case before it, the train had not moved from the spot of its assembly "because it had not been released following inspection because the inspection was not yet complete." *Id.* at 189.

In *Deans*, a conductor, Dennis Deans, and an engineer were assigned to take a train to another location. When Deans arrived at the yard, the railcars making up the train were already coupled together; however, before the train could leave, Deans had to perform the following three tasks: (1) couple the engine to the railcars; (2) release the hand brakes on the railcars; and (3) conduct a pre-departure brake test. After coupling the engine, but prior too conducting the air brake test, Deans was injured while trying to release the hand brake on the third car. The hand brake was found to be defective. After Deans filed suit, CSX moved for summary judgment on the grounds that the railcar was not "in use" at the time of Deans's accident.

The Fourth Circuit noted than the district court relied on the Fifth Circuit's decision in *Trinidad. Deans*, 152 F.3d at 329. The Fourth Circuit asserted:

> Analogizing the facts in this case to *Trinidad*, the district court noted that the air brake test had yet to be completed at the time of Deans's injury and no movement of the train was imminent, and therefore concluded that the train that injured Deans was not "in use" at the time of the accident. This focus on the completion of the air brake test suggests that the district court sought to draw a useful and practical, bright-line distinction between trains which have had their pre-departure inspections and tests completed and been okayed for service (and are therefore "in use"), and those for which pre-departure tests have not yet been completed (and therefore are not "in use"), such a distinction, is too facile to accurately

> reflect the multitude of steps required—and various sequences in which these steps may be taken—to prepare a train for departure. For example, while the district court here concluded that the train was not "in use" at the time of Deans's injury because the train would not be "okayed" for service until the air brake test was completed and, at the time of the accident that had not yet been done, the record shows that there is no relationship between the release of the hand brakes, during which activity Deans was injured, and the performance of the air brake test; it apparently does not matter whether the hand brakes were released before the air brake test was run. Therefore, under the district court's analysis, the train here—which had already passed its required inspections—would have been okayed for service and hence "in use" if Deans had simply chosen to conduct the air brake test prior to releasing the hand brakes.
>
> It is inappropriate to base liability under the [SAA] on the mere happenstance of whether an employee chooses to release the hand brakes or conduct an air brake test first, however, and we believe a more consistent and fairer result is reached by looking at a number of different factors, rather than simply at the completion or non-completion of pre-departure tests. Therefore, to determine whether a train is "in use" for purposes of the [SAA], ''the primary factors we consider are where the train was located at the time of accident and the activity of the injured party.

Id. at 329 (citations omitted).

The Fourth Circuit noted that in the case before it the train already had its engine coupled and was standing on a track in the rail yard in preparation for imminent departure—"not in storage or waiting to be moved into a repair location." *Id.* at 330. In addition, Deans was part of the transportation crew and was not involved in the repair or maintenance of the train.

Id. Deans's job was to put the train in motion, and he was engaged in an activity to do exactly that by releasing the hand brake. *Id.* "The fact that the air brake test still needed to be completed, a test that could have been completed prior to the release of the hand brakes, is not in this case dispositive." *Id.* The Fourth Circuit held as a matter of law that the train was "in use" at the time of Dean's injury.

The Fourth Circuit applied its newly established test and reached the opposite result in *Phillips v. CSX Transp., Inc.*, 190 F.3d 285 (4th Cir.1999). In that case, Jeffrey Phillips, the foreman of a yard crew, was engaged in "normal train switching operations" consisting of taking arriving trains apart and putting departing trains together. *Phillips*, 190 F.3d at 286. The Fourth Circuit discussed the nature of those switching operations as follows:

> The normal procedure when a train arrives at the yard is for the yard crew to disconnect all of the train's cars from one another, and to turn the cars over to the car department for a mechanical inspection. As part of its inspection, the car department checks the cars' safety appliances. If the car department discovers any defects during this inspection, it sets the defective cars aside for repair. Once the mechanical inspection is complete, the car department turns the cars back over to the yard crew. The yard crew then assembles the cars into new trains for departure. However, before a train may depart, it must undergo a predeparture inspection, which the car department also conducts. The yard crew engages the handbrakes on the cars in an assembled train, detaches the engine, and then turns the train over to the car department for the predeparture inspection. The car department inspects the train's air brakes and again checks its safety appliances. Once the predeparture inspection is

> complete, the car department turns the train over to the transportation crew, and the train departs.

Id. at 286-287. Phillips was injured while engaging the handbrakes on a completed train prior to turning the train over to the car department for its predeparture inspection when a handrail broke. *Id.* at 287. The train was sitting on yard track at the time. *Id.* The district court granted summary judgment in favor of Phillips, finding that the train was "in use." *Id.*

The Fourth Circuit noted that the district court did not have the benefit of its decision in *Deans* in rendering its judgment. *Id.* at 289. The Fourth Circuit asserted that Phillips's case differed significantly from *Deans* with respect to the two *Deans* factors. *Id.*

> While in both cases the trains were assembled and sitting in the yard, the train in *Deans* was undergoing its predeparture inspection, it was coupled to its engine, its handbrakes were being released, and its departure was. "imminent." In this case, on the other hand, the train was about to be uncoupled from its engine, its handbrakes were being engaged, and it had yet to undergo its predeparture inspection. Moreover, the plaintiff in *Deans* and Phillips in this case were engaged in very different activities at the time of their injuries. The plaintiff in *Deans* was a member of the train's transportation crew, whereas Phillips was a member of the Cumberland yard crew. Philip's responsibilities were limited to switching operations. Plus, the plaintiff in *Deans* was injured while releasing the train's handbrakes, while Phillips was hurt while engaging his train's handbrakes to prevent it from moving. Finally, in *Deans* we emphasized the fact that the plaintiff could have released the handbrakes after the predeparture inspection, in conjunction with the departure of the train. In this case, Phillips had to engage the handbrakes prior to the predeparture inspection, in

> conjunction with the assembly of the train. Taken together, the facts in this case show that Phillips was injured at the end . of, the switching process, rather than at the beginning of the departure process.

Id. at 289-90. The Fourth Circuit held that the train was not "in use" at the time of Phillips's injury. *Id.* at 290.

The Fourth Circuit's test is more useful than the Fifth Circuit's bright line test in resolving the "in use" requirement taking into, consideration: (1) the stated purpose of the "in use" limitation; and (2) general congressional intent to provide liberal recovery for injured railroad workers: 'As previously :noted, the stated purpose of the "in use" limitation is to give railroads the opportunity to inspect for and correct safety appliance defects before being exposed to the SAA's strict liability for such defects. Applying the Fourth Circuit's test, the location of the train is important for purposes of determining whether the railroad had the opportunity to complete the type of inspection that the SAA requires before imposing-strict liability. The activity of the injured party also important to determine whether the activity normally occurs before the railroad had the opportunity to complete its inspection or after the railroad's inspection

Applying the Fourth Circuit's test, the railcar in the instant case was in a group of coupled railcars on an outbound track. No further inspection was to occur except for the cursory inspection by Jones in preparing the cars for departure. Jones had already engaged in his cursory inspection of the handhold before climbing onto the car and only, fell while using the handhold to climb off the car. Therefore, the stated purpose of the "in use" limitation—to give railroads the opportunity to inspect for' and correct safety appliance defects before being exposed to the SAA's strict liability for such defects—had been satisfied, i.e., the inspection of the handhold had been completed. *See Phillips v. CSX Transp., Inc.*, 190 F.3d at 288 (noting purpose of "in use" limitation); *Angell*, 618 F.2d at

261 (noting completion of inspection to be critical factor). Furthermore, Jones was a switch foreman involved in the transportation of railcars. Jones was injured while releasing the handbrake on a railcar, and the movement of the railcars was imminent.

The majority contends that the departure of the cars was "far from imminent" because the engine would not be coupled to the cars for a number of hours. However, the record reveals that the engine was in the process of being coupled at the time Jones was injured in order to move the cars from the Lubrizol lead to the Lubrizol siding. Although the cars may have remained on the Lubrizol siding while Jones and his co-workers went to other facilities to pick up additional cars, the train was "in use" for purposes of 'moving the cars from the lead to the siding. The engine had to be coupled to the cars and all air hoses had to be attached in order to move the cars for that purpose, and no further inspection apart from the air brake test would be undertaken when the workers returned to Lubrizol to collect the railcars to return to the yard. If the majority's conclusion is correct, and the fact that the cars were not in the yard is a decisive factor, a worker engaged in collecting railcars from industries to be returned to a yard could 'never recover under the SAA because a train involved in this type of hauling operation would never be considered "in use." I do not believe that this conclusion is' consistent with the stated purpose of the ' "in use" limitation.

I would therefore hold that the railcar was "in use" at the time of Jones's injury. Because the majority holds otherwise, dissent.

APPENDIX B

COURT OF APPEALS
Fourth Court of Appeals District
Bexar County Justice Center, Suite 3200
300 Dolorosa
San Antonio, Texas 78205-3037

May 29, 2002

Gordon A. Holloway
Holloway & Rowley, P.C.
1415 Louisiana, Suite 2550
Houston, TX 77002

Kyle M. Rowley
Holloway & Rowley, P.C.
1415 Louisiana, Suite 2550
Houston, TX 77002

George Payne
Garrett, Letbetter & Payne, Inc.
2500 Tanglewilde, Suite 278
Houston, TX 77063

RE: Court of Appeals Number: 04-01-00042-CV
Trial Court Case Number: 98-15997

Style: Port Terminal Railroad Association
v.
Michael Jones

After examination of the record in the above styled and numbered cause, the Court DENIES Appellee's Motion for Rehearing. ORDERED the day and year first above written.

Very truly yours,

HERB SCHAEFER, CLERK

/s/ Elise Dixon
ELISE DIXON, Deputy Clerk
Ext. 3261

APPENDIX C

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711

November 21, 2002

Mr. Tom R. Letbetter
Garrett, Letbetter & Payne
2500 Tangleilde, Ste. 278
Houston, TX 77063

Mr. Kyle M. Rowley
Holloway & Rowley
1415 Louisiana, Suite 2550
Houston, TX 77002

RE: Case Number 02-0596
Court of Appeals Number: 04-01-00042-CV
Trial Court Number: 98-15997

Style: MICHAEL JONES
v.
PORT TERMINAL RAILROAD ASSOCIATION

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,

Andrew Weber, Clerk

by /s/ Gena Pelham
GENA PELHAM, Deputy Clerk

cc: Mr. Herb Schaefer, Clerk
Mr. Charles Bacarisse

APPENDIX D

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711

March 06, 2003

Mr. Tom R. Letbetter
Garrets Letbetter & Payne
2500 Tanglewilde, Ste. 278
Houston, TX 77063

Mr. Kyle M. Rowley
Holloway & Rowley
1415 Louisiana, Suite 2550
Houston, TX 77002

RE: Case Number 02-0596
Court of Appeals Number: 04-01-00042-CV
Trial Court Number: 98-15997

Style: MICHAEL JONES
v.
PORT TERMINAL RAILROAD ASSOCIATION

Dear Counsel:

Today, the Supreme Court of Texas denied the motion for rehearing of the above styled petition for review.

Sincerely,

Andrew Weber, Clerk

by /s/ Jessica L. Vlasac, Deputy
JESSICA L. VLASAC

cc: Mr. Herb Schaefer, Clerk
Mr. Charles Bacarisse

APPENDIX E

IN THE COURT OF APPEALS, TWELFTH COURT OF APPEALS DISTRICT, TYLER, TEXAS

No. 12-99-00428-CV

KENNETH SYNAR,
Appellant/Cross-Appellee

v.

UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY,
Appellees/Cross-Appellants

APPEAL FROM THE 87TH JUDICIAL DISTRICT COURT OF ANDERSON COUNTY, TEXAS

Kenneth Synar ("Synar") sued the Missouri Pacific Railroad Company doing business as Union Pacific Railroad Company ("UP") for violations of the Federal Employer's Liability Act ("FELA") and the Federal Safety Appliance Act ("FSAA"). The jury found that UP was negligent and violated the FSAA, but also found Synar thirty percent contributorily negligent. The trial court disregarded the jury's finding that UP violated the FSAA and reduced the award by thirty percent pursuant to the applicable statute. Synar raises two issues on appeal, while UP raises thirty-one issues and two cross-points. We modify the trial court's judgment to reinstate the jury's finding on the FSAA issue thus allowing recovery for a violation of the FSAA, making the statutory thirty percent reduction inapplicable. We further modify the judgment to reflect that Synar take nothing on his claims for past medical expenses and future medical expenses. As modified, we affirm.

BACKGROUND

Synar began working for UP's predecessor on March 27, 1978 as a switchman and brakeman. As of the time of trial, he was still employed by UP. While he had worked in several different cities, he spent the majority of his career working in the railyard at Muskogee, Oklahoma. His job involved jumping onto moving cars, turning the hand brake wheel to stop them, and throwing switches to redirect cars to appropriate tracks in order to build trains. In 1990, he began experiencing pain in his right arm intermittently. He self-treated for years while continuing to work. The pain worsened progressively. He consulted Dr. Jay Yoo about it for the first time on February 18, 1994. He was diagnosed as having progressive neuropathy of the ulnar nerve of the right arm. Synar filed suit against his employer on September 29, 1995. Although his doctors recommended surgery in 1994, Synar did not have surgery until July 27, 1998. Due to complications, he underwent a second surgery on August 5, 1998. Synar had worked until the first surgery, then remained off duty until November 1998. Because his condition deteriorated after he returned to work, upon doctor's orders, he stopped working in January 1999 on doctor's orders.

LIMITATIONS

In its issues one through five, UP attacks, in various ways, the jury's answer to question five, the finding that Synar's case is not barred by the applicable three-year statute of limitations. UP asserts that the evidence shows Synar told Dr. Yoo that he experienced pain when he turned brake wheels in 1990. Additionally, Synar told Dr. Charles Lutton, a neurologist who also examined him, that he had noticed improvement when he switched jobs, which UP asserts occurred in 1991. This, UP argues, constitutes proof that Synar knew of his injury and its relation to his work at the railroad as early as 1990, five years before Synar filed suit, Based on this argument, UP contends that Synar's claim is

barred because there is no evidence, or only factually insufficient evidence, supporting a finding that the case was filed within the limitations period. UP further asserts that the trial court erred by not granting its motion for directed verdict, its motion for judgment notwithstanding the verdict, and its motion for new trial, on limitations grounds.

Synar responds that his cause of action is not premised on a one-time injury. Synar alleges that he sustained injuries over "many years" in the course of his employment with UP, by engaging in repetitive and hazardously strenuous motions. He asserts that he did not know he had an injury until February 18, 1994, when he first saw a doctor about the pain in his arm. Before that date he did not know that his work at UP aggravated the condition. Applying the discovery rule, he argues, his suit, which he filed on September 29, 1995, is well within the three year limitations period.

Standards of Review

If an appellant is attacking the legal sufficiency of an adverse finding of an issue on which he did not have the burden of proof, the appellant must demonstrate on appeal that there is no evidence to support the adverse finding. *See Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex.1983). An appeal from the denial of a motion for directed verdict is in essence a challenge to the legal sufficiency of the evidence. *Lochinvar Corp. v. Meyers,* 930 S.W.2d 182, 187 (Tex. App.—Dallas 1996, no writ). Likewise, a challenge on appeal that the trial court erred in denying a motion for judgment notwithstanding the verdict is construed as a legal sufficiency challenge and reviewed in the same manner. *See Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 227-28 (Tex. 1990). In reviewing no evidence points of error, the reviewing court must consider only the evidence and inferences tending to support the trial court's finding, disregarding all contrary evidence and inferences. *War-Mart Stores, Inc, v. Gonzalez*, 968 S.W.2d 934, 936 (Tex. 1998). If there is any evidence of

probative force to support the finding, the no evidence issue must be overruled and the finding upheld. *ACS Investors, Inc. v. McLaughlin*, 943 S.W.2d 426, 430 (Tex. 1997).

If a party is attacking the factual sufficiency of an adverse finding on an issue to which the other party had the burden of proof, the attacking party must demonstrate that there is insufficient evidence to support the adverse finding. *See Croucher*, 660 S.W.2d at 58. In addressing a factual sufficiency of the evidence challenge, this Court must consider and weigh all of the evidence and set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175,176 (Tex. 1986). Findings of fact are the exclusive province of the jury. *Bellefonte Underwriters Ins. Co. v. Brown*, 704 S.W.2d 742, 744 (Tex. 1986). Accordingly, if there is sufficient competent evidence of probative force to support the finding, it must be sustained. *Beall v. Ditmore*, 867 S.W.2d 791, 795-96 (Tex. App.—El Paso 1993, writ denied). When there is conflicting evidence, the jury's verdict on such matters is generally regarded as conclusive. *Id.* at 796.

The standard of review applied to consider a complaint that the trial court erred in denying a motion for new trial depends on the complaint preserved in the motion. *Hicks v. Ricardo*, 834 S.W.2d 587, 590 (Tex. App.—Houston [1st Dist.] 1992, no writ). The decision of the trial court to grant or deny a motion for new trial is an exercise of the trial court's judicial discretion and will got be overturned on appeal in the absence of an abuse of discretion. *Thomas Oldham*, 895 S.W.2d 352, 356 (Tex. 1995).

Applicable Law

The limitations period under FELA is three years from the day the cause of action accrued. 45 U.S.C.A. § 56 (West 1986). In an FELA action, compliance with the statute of

limitations is a condition precedent to recovery rather than all affirmative defense. *Emmons v. Southern Pac. Transp. Co.*, 701 F.2d 1112, 1117 (5th Cir.1983). The burden is on the claimant to allege and prove that he filed suit within the three-year period. *Id.* at 1118. When the specific date of injury cannot be determined because an injury results from continual exposure to a harmful condition over a period of time, a claimant's cause of action accrues when the injury manifests itself. *Urie v. Thompson,* 337 US. 163, 170, 69 S. Ct. 1018, 1025, 93 L.Ed. 1282 (1949). Accordingly, the discovery rule applies to determine when an FELA cause of action accrues. *See United States v. Kubrick*, 444 U.S. 111, 121-23, 100 S. Ct. 352, 359-60, 62 L. Ed. 2d 259 (1979). Inquiries involving the discovery rule usually entail questions for the trier of fact. *Childs v. Haussecker*, 974 S.W.2d 31, 44 (Tex. 1998). A claim accrues when the claimant should reasonably have been aware of the critical facts of injury and causation. *DuBose v. Kansas City S.Ry.*, 729 F.2d 1026, 030 (5th Cir.), *cert. denied,* 469 U.S. 854 (1984). Awareness of critical facts will impose a duty to investigate the potential cause. *Fries v. Chicago & Northwestern Tranp. Co.*, 909 F.2d 1092, 1095 (7th Cir. 1990).

Discussion

The jury was asked on what date did Synar first become possessed of the critical facts of his alleged work injury and its causation. The jury answered February 18, 1994. The record shows that Synar first consulted a doctor about the pain in his arm on February 18, 1994 when he saw Dr. Yoo. The medical records of each doctor he saw about this problem reflect that the pain began in 1990 and gradually increased in severity until early 1994 when he felt he needed to see a doctor. These medical records indicate that, by early 1994, Synar had come to believe he had an injury caused by his work on the railroad and that it occurred gradually over the course of his employment. Synar's testimony reiterated these

facts. He emphasized that, while he experienced some pain in 1990, he did not know at that time that he had an injury. He also stated that in 1990 and 1991, he did not even experience pain on a daily basis. Only one of Synar's co-workers testified that he complained of pain and that was in 1994 and 1995.

After reviewing the evidence and inferences tending to support the finding that limitations had not run before Synar filed suit, we conclude that UP's legal sufficiency challenges fail. There is evidence of probative force to support the jury's finding that Synar first became aware of the critical facts of his injury and its cause on February 18, 1994, the day he first saw a doctor about the pain in his arm. *See DuBose,* 729 F.2d at 1030. Accordingly, we overrule issues one, three, and five.

Up also contends the evidence is factually insufficient to support the finding that Synar's cause of action is not barred by limitations. UP asserts that the evidence shows Synar knew of his injury in 1990 and 1991 and had a duty to investigate the cause at that time. UP also asserts that, in 1990 and 1991, Synar's pain was aggravated by work and disappeared when he was not working. This, UP argues, put Synar on notice that his injury was work related, we consider all the evidence on the issue of limitations to determine if Synar should reasonably have been aware of critical facts of injury and causation more than three years before September 29, 1995.

To support its argument, UP relies largely on medical records containing statements by Synar that his injury occurred over as much as a twenty-year period. Those statements were made by Synar between the years 1994 and 1996. The records merely indicate that by early 1994, Synar believed he had an injury and it was caused by his work at UP over the course of many years. They do not indicate that he knew of the injury between four and twenty years earlier.

In his notes detailing his April 25, 1994 visit with Synar, in a paragraph entitled "History of Present Illness," Dr. Lutton referred to Synar's condition over the "past 4 years," "[o]ver the last year," and "[c]urrently." In the next sentence he stated that "Synar has noted some mild improvement since he has switched jobs." The remainder of the paragraph speaks in terms of Synar's present condition. No explanation was included as to the nature of the job he switched to or the dates he worked a different job, Synar testified that he was a switchman until 1997 and had no independent recollection of switching jobs.

When shown a document purported to be his work history, Syrian agreed that it indicated that he had been a through-freight conductor and brakeman for a period of about two or three months in 1991. This document was not placed in evidence. UP contends that Dr. Lutton's reference to improvement after switching jobs is a reference to that two or three-month period in 1991, thus showing his symptoms improved in 1991. UP further argues that the presence of symptons in 1990 that improved in 1991 when he changed jobs constituted the required critical facts to trigger Synar's duty to investigate in 1991, outside the limitations period. We disagree.

Synar's symptoms were intermittent in 1990, not ongoing. The record does not clearly indicate that the improvement resulting from changing jobs, referenced by Dr. Lutton, occurred in 1991. The record does not show that the symptoms had manifested themselves sufficiently enough in 1990 and 1991 to alert Synar to the need to see a doctor. Further, Synar's acknowledgment in 1994, that in 1990 he had felt some pain while working that dissipated when he was not working, is not tantamount to an admission that he had an injury and that it was work related. We conclude that there is sufficient competent evidence of probative force to support the jury's finding that Synar filed his cause of action within

the limitations period. *See Beall,* 867 S.1 .2d at 795-96. As the jury's finding was not in error, the trial court did not abuse its discretion in denying UP's motion for new trial on limitations grounds. *See Thomas*, 895 S.W.2d at 356. We overrule UP's issues two and four.

ADMISSIBILITY OF TESTIMONY

Quentin Pickering

In its fourteenth issue, UP asserts that the trial court erred in allowing the testimony of Quentin Pickering, Synar's expert on railroad safety. UP identified eight objections it made at trial to eight specific statements on various grounds. Additionally, at the end of Pickering's testimony, UP moved to strike Pickering's entire testimony on the grounds that it was irrelevant and that Dickering "has no business being air expert in this case," UP contends that Dickering should not have been allowed to testify that the railroad was negligent. UP characterizes Pickering's testimony as absurd and unfounded, with no basis in the law or evidence, and claims that Dickering has no expertise. UP has not included concise argument supported by appropriate citations to authority regarding each of the eight individual objected-to statements referenced under this issue. *See* TEX. R. APP. P, 38.1(h). Accordingly, we interpret this issue as a complaint that the trial court erred in denying its motion to strike Pickering's entire testimony. *See* TEX. R. APP. P. 38.1(c).

If technical or other specialized knowledge will assist the trier of fact, a witness qualified as an expert may testify in the form of an opinion or otherwise. TEX. R. EVID.702. Whether a witness is qualified to offer expert testimony is a matter committed to the trial court's discretion. *United Blood Servs. v. Longoria*, 938 S.W.2d 29, 30 (Tex. 1997) (per curiam). The trial court must determine if the putative expert has knowledge, skill, experience, training, or education that would assist the trier of fact. *Id.* at 30-31. The burden of

establishing an expert's qualifications is on the offering party. *Id.* at 31. An expert may state an opinion on a mixed question of law and fact as long as the opinion is confined to the relevant issues and is based on proper legal concepts. *Birchfield v. Texarkana Mem. Hosp.,* 747 S.W.2d 361, 365 (Tex. 1987).

Contrary to UP's assertion, Pickering's background includes much more than just "writing safety rules." He worked for UP's predecessors since 1959 in progressively more responsible positions in the area of safety regulations until his retirement, almost thirty years later, in 1988. He wrote, interpreted, and taught safety rules, was responsible for rules compliance and safety performance in switching yards, and helped write a common safety rule hook for use by several railroads. In determining that bickering qualifies as an expert, the trial court did not act without reference to any guiding rules or principles. *See Longoria*, 938 S.W.2d at 31. Pickering qualifies as an expert in the field of railroad safety. As Synar's causes of action are based largely on the allegation that UP negligently failed to provide a safe workplace, Pickering's experience and training are focused on prominent issues presented in this case. The trial court did not abuse its discretion in allowing Dickering to testify as an expert. *Id.* at 30-31. As an expert, Pickering could properly testify that UP's actions constituted negligence. *Birchfield,* 747 S.W.2d at 365. We overrule UP's fourteenth issue.

Dr. Tyler Kress, Ph.D.

In its twenty-third issue, UP contends the trial court erred in admitting testimony of Dr. Tyler Kress, Ph.D. Specifically, UP complains of Kress's testimony that, from an ergonomics standpoint, the Muskogee yard was not reasonably safe and there was careless attention paid to ergonomics issues. Without further explanation, UP states that this testimony should have been excluded for the same reasons Pickering's testimony should have been excluded.

We find no trial objection to Kress's designation as an expert witness. To the extent UP is asserting that he should not have been designated as an expert, that complaint has been waived, *See Kroger Coo v. Betancourt*, 996 S.W.2d 353, 360 (Tex. App.—Houston [14th Dist.] 1999, pet, denied). Moreover, his qualifications are adequately explained in the record. His education and work are in the areas of biomedical engineering and human factors engineering. His work, including teaching, research, and consulting, involves the application of engineering principles to the human body, focusing on injury prevention. This includes the biomechanical and ergonomical engineering aspects of safety and injury. Synar's suit involved allegations that UP did not provide him with a safe place to work, leading to his repetitive-use injury. Kress could properly testify as to these matters. *See Birchfield*, 747 S.W.2d at 365. We overrule UP's twenty-third issue.

Physicians

In its twenty-fourth issue, UP contends that the trial court erred in admitting testimony of Dr. Lutton, Dr. Charles Fullenwider, and Dr. James Slates concerning causation, It asserts that their testimony is rife with misuse of and abuse of hypothetical questions. UP contends that the questions and their responses should have been excluded because they confused and misled the jury and prejudiced UP. It asserts that Synar's counsel was attempting to recite his theory of the case, making factual assumptions that were not facts in evidence and skewing the evidence. Finally, UP asserts without argument that such testimony was not grounded in valid scientific knowledge.

Opinion testimony of an expert witness may be based on hypothetical questions embracing facts supported by the evidence. *Clark Equip. Co. v. Pitner*, 923 S.W.2d 117,123 (Tex. App.Houston [14th Dist.] 1996, writ denied). A trial judge has wide discretion in ruling on the propriety of a

hypothetical question and his determination will be overturned only on a clear showing of abuse. *Thomas v. St. Joseph Hosp.*, 618 S.W.2d 791, 794-95 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.). Accordingly, a trial court has considerable latitude in determining whether hypothetical questions posed to an expert witness are based upon a fair assumption of facts. *Pitner*, 923 S.W.2d at 123. It is not necessary that the facts upon which an expert bases his opinion be uncontroverted, *Collies v. Chipman*, 41 Tex. Civ. App. 563, 95 S.W. 666, 671 (1906, writ ref'd). Further, a hypothetical can be based on evidence merely tending to show the fact. *Gulf, W.T.&P. Ry. Co, v. Abbott*, 146 S.W. 1078, 1 082 (Tex. Civ. App.—San Antonio 1912, writ ref'd).

The hypotheticals asked each doctor to assume that Synar worked as a switchman for UP for many years, turning hand brakes and throwing switches. The doctors were asked to assume Synar was required to exert significant force to do so, at times in excess of one hundred pounds of force. They were also asked to assume that he was required to set approximately seventy-five to one hundred hand brakes per day and to throw approximately fifty to one hundred switches per day. They were then asked whether Synar's work at UP caused or contributed to the ulnar neuropathy of his right arm.

The record shows that Synar was a switchman for the railroad since 1978. Dr. Kress testified that he tested some hand brakes and switches in the Muskogee yard and found that it took in excess of one hundred pounds of force to manipulate at least one brake wheel tested and to throw the swatches he tested. Synar testified that, on average, he set between seventy-five and one hundred hand brakes on a typical day and threw between seventy-live and one hundred switches a day. Gerald Garretson, a longtime railroad employee who worked in the Muskogee yard testified that it takes fifty, seventy-five or one hundred pounds of pressure to tighten hand brakes. Although other witnesses testified that

Synar set, or in the vernacular, tied, fewer hand brakes and threw fewer switches, it is not necessary that the facts relied on by the doctors be uncontroverted. *See Collins*, 95 S.W, at 671. Because the hypothetical questions asked of the doctors were based on a fair assumption of facts presented by the evidence, the trial court did not abuse its discretion in allowing them, *See Pitner*, 923 S.W.2d at 123.

UP's final assertion under this issue, that the testimony based on the hypothetical questions was not grounded in valid scientific knowledge, was not raised at trial. Accordingly, this argument is waived. *See General Motors Corp. v. Sanchez*, 997 S.W.2d 584, 590-91 (Tex. 1999) (allowing reliability challenge on appeal in absence of trial objection usurps trial court's discretion to screen out unreliable expert evidence). We overrule UP's twenty-fourth issue.

Kenneth Synar

In its twenty-second issue, UP contends the trial court erred in refusing to allow cross-examination of Synar regarding disability benefits he was presently drawing through the Railroad Retirement Board. UP asserts that Synar opened the door by testifying about his financial hardship. Additionally, evidence of his eligibility for railroad retirement benefits was before the jury. Under these circumstances, UP argues, it was entitled to inquire into Synar's eligibility for and receipt of railroad retirement disability benefits and his receipt of money from other sources.

On direct examination, Synar testified that, upon retirement, he will get retirement benefits. In response to counsel's inquiry into the emotional or mental effects of his injury and the loss of his career and hobbies, Synar explained that he does not have a job to go to and he does not have any money to do anything with. He further explained that he cannot plan or go anywhere.

Evidence of collateral source payments, including disability payments, is ordinarily inadmissible. *Eichel v. New York Cent. R.R. Co.*, 375 U.S. 253, 255, 84 S. Ct, 316, 317, 11 L. Ed. 2d 307 (1963). however, such evidence may be admissible for impeachment purposes when the plaintiff has given testimony inconsistent with the receipt of payments, *Lange v. Missouri Pac. R.R. Co.*, 703 F.2d 322, 324 (8th Cir. 1983). For instance, plaintiff will have opened the door to testimony regarding disability payments where he infects the issue of his poverty. *Mundy v. Shippers, Inc.*, 783 S.W.2d 743, 744 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

We disagree that, by his testimony, Synar opened the door for evidence of disability benefits. He never stated whether he was receiving such benefits. Therefore, there was no need to impeach him on that basis. Further, his reference to money was not a declaration of poverty. He was explaining the emotional and mental effects of his present situation, not his financial status. The trial court did not abuse its discretion in refusing to allow cross-examination of Synar on the issue of retirement disability payments. *Eichel*, 375 U.S. at 255, 84 S. Ct. at 317. We overrule UP's issue twenty-two.

NEGLIGENCE

UP's issues seven through cloven concern jury charge question number one, which inquired whether any negligence by UP caused Synar's injuries, and the fury's affirmative answer to that question. In these issues, UP contends that there is no evidence warranting submission of question number one to the jury, there is no evidence, or only insufficient evidence, supporting the jury's answer to question number one, and the trial court erred in denying UT's motions for directed verdict and for judgment notwithstanding the verdict as to negligence. More specifically, CAP argues that there is no evidence, or insufficient evidence, to establish that it breached its duty to provide Synar a reasonably safe work-

place, that UP could have foreseen Synar's injury, or that the conduct of UP caused Synar's injury.

Standards of Review

In addressing the no evidence challenges, including the challenges to the trial court's denial of UP's motions for directed verdict and for judgment notwithstanding the verdict and the propriety of submitting the negligence question to the jury, we consider only the evidence and inferences tending to support the finding. *Wal-Mart Stores, Inc.*, 968 S.W.2d at 936; *Elbaor v. Smith*, 845 S,W.2d 240, 243 (Tex. 1992); *Mancorp, Inc*, 802 S.W.2d at 227-28; *Lochinvar Corp.*, 930 S.W.2d at 187. If there is any evidence of probative force to support the finding, it will be upheld. *McLaughlin*, 943 S.W.2d at 430. However, factual sufficiency reviews of a jury's finding of liability under the FELA is precluded. *Texas & Pre. Ry. Co. v. Roberts*, 481 S.W.2d 798, 800 (Tex. 1972).

Applicable Law

When FELA cases are brought in state court, federal law governs the substantive rights of the parties and state rules govern procedural matters. *Mitchell v. Missouri-Kansas-Texas R. R. Co.*, 786 S.W.2d 659, 661 (Tex. 1990) (on reh'g). Under federal law, a railroad carrier is liable for damages to its employees who suffer an injury "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances . . . or other equipment." 45 U.C.S.A. § 51 (West 1986). A FELA, plaintiff must prove the common law components of negligence, including duty, breach, foreseeability, causation, and injury. *Adams v. CSX Transp., Inc.*, 899 F.2d 536, 539 (6th Cir.1990).

Breach of Duty and Forseeability

Railroads have a duty to provide employees a reasonably safe place in which to work and such protection against hazards as would be expected of a person in the exercise of ordinary care under those circumstances. *Urie*, 337 U.S. at 178 n.16, 69 S. Ct. at 1029 n.16; *Missouri Pac. R.R. Co, v. Roberson*, 25 S.W.3d 251, 256 (Tex. App.—Beaumont 2000, no pet.). Ordinary care must be in proportion to the danger to be avoided and the consequences that might reasonably be anticipated from the neglect. *Urie*, 337 U.S. at 179, 69 S. Ct. at 1029. Ordinary care must be commensurate with known dangers. *Id.* However, "known dangers" does not mean that the injury must have occurred on a previous occasion to the same or a similarly situated worker. *Aparicio v. Norfolk & Western Ry. Co.*, 84 F.3d 803, 810-11 (6th Cir.1996).

The carrier breaches its duty to provide a safe workplace if it knew or should have known of a potential hazard in the workplace, and yet failed to exercise reasonable care to inform and protect its employees. *Ulfik v. Metro-North Commuter R.R.*, 77 F.3d 54, 58 (2nd Cir.1996). The touchstone of this negligence inquiry is the issue of foreseeability, whether or not the carrier knew or should have known of the potential hazard. *Id.* The test for foreseeability does not requite that the negligent person should have been able to foresee the injury in the precise form in which it in fact occurred. *Adams*, 899 F.2d at 540. Negligence attaches if the carrier knew or by the exercise of due care; should have known that prevalent standards of conduct were inadequate to protect employees. *Urie*, 337 U.S. at 178, 69 S. Ct. at 1028.

The record shows that in 1988 there were six carmen working in the Muskogee yard inspecting and repairing cars. Tea 1992, there were only three. After that, the number continued to diminish. Accordingly, there was an insufficient number of men to inspect and repair the cars in the Muskogee railyard. One longtime railroad employee, Gerald Garretson,

testified that between thirty and thirty-three percent of hand brakes on cars in the Muskogee yard were defective. He also complained that he did not have the right tools to repair them. Quentin Dickering, Synar's safety expert, testified that UP failed to properly maintain equipment and was negligent in requiring Synar to work under those circumstances. He explained that the repetitive nature of the job made it ergonomically incapable.

Synar testified that, on average, he set seventy-live to one hundred hand brakes on a typical day and threw seventy-five to one hundred switches a day. He estimated that about thirty percent of the hand brakes he encountered required a lot of force and two hands to set and that about five percent were inoperative. He explained that some of the hand brakes and switches were in disrepair. He said he had to push or pull weights of more than twenty-five pounds constantly and had to push and pull weights of more than fifty pounds occasionally.

Douglas Hammer, another railroad employee, testified that ten to fifteen percent or "a lot" of the brakes that he tied were extremely hard to tie. He did not consider those brakes to be safe. He also stated that they had problems with eighty percent of the switches and that the switches were in "bad shape," needing cleaning and lubrication. He opined that the Muskogee yard was poorly maintained in the '90's. He claimed that no one did inspections from 1994 to 1998 and that there were not enough maintenance people.

Gary Scott, the highest level management official UP has in the Muskogee yard, testified that he has no responsibility to make sure the equipment is in good condition. He also stated that in the two years before this trial, some of the switches were replaced with different models that are easier to throw. He testified that if a hand brake is difficult to turn, that car should be set aside for repair.

Dr. Tyler Kress, the biomedical engineer, viewed the Muskogee yard from an ergonomics standpoint and determined that the yard was not reasonably safe. He explained that the field of ergonomics is the study of how humans interface with their work environment, particularly considering productivity and safety. Kress testified that one of the brake wheels he tested required in excess of one hundred pounds of poundage or force to manipulate it. Also, it took in excess of one hundred pounds to throw the switches that were tested. This amount of force is in excess of the recommended weight loads of the National Institute of Occupational Safety, It is undisputed that UP provided no ergonomics training or information regarding repetitive trauma disorders or overuse injuries to its Muskogee employees.

Thus, the evidence showed that-there was an insufficient number of employees working with equipment that was in disrepair and inproperly maintained. The Muskogee yard's management did not feel responsible for maintaining equipment and provided no ergonomics training or information. There was testimony that it takes an inordinate amount of force to tie brakes and throw switches. Finally, from the fact that UP replaced some switches with a different type that is easier to throw, the jury could infer that the old switches needed to be replaced because they were difficult to throw. *See Heater v. Chesapeake and Ohio Ry. Co.*, 497 F.2d 1243, 1247 (7th Cir.), *cert. denied*, 419 U.S. 1013 (1974) (In passing on fault and causality, the jury has a broad power to engage in inferences.). Accordingly, Synar presented sonic evidence that UP breached its duty of care.

Regarding foreseeability, the record indicates that UP should have known that Synar could have sustained on the job injuries. Contrary to UP's assertion, it was not necessary for Synar to have notified UP of his injuries or to have shown that other employees had previously suffered the same injury. *See Aparicio*, 84 F.3d at 810-11. Moreover, the jury had

before it evidence from which it could conclude that Synar's injury was foreseeable. Garretson testified that he had complained to his superiors that there was an insufficient number of men to take care of the number of cars in need of repair. Synar testified that he had reported to Scott that the equipment was worn out and did not operate properly. He also testified that each day during one time period, he reported an average of five or six malfunctioning brakes to a past supervisor, Freddy Lowrance. Finally, Kress testified that the Association of American Railroads has been doing research in the field of ergonomics since the early 1980's and started publishing their findings shortly thereafter. That association has made its articles available for railroad use. Accordingly, UP has had access to information in the field of ergonomics, including studies on the effects of actions involving repetitive flexion and force such as tying hand brakes and throwing switches. We conclude that Synar presented some evidence to show UP knew or should have known of the potential hazard presented by requiring Synar to engage in activities requiring the repetitive use of his right arm and hand and that UP breached its duty to provide a safe workplace. *See Urie*, 337 U.S. at 178, 69 S. Ct. at 1028; *Ulfik*, 77 F.3d at 58-59.

Causation

UP asserts that there was insufficient evidence to establish that any negligence by UP actually caused Synar's injuries. It argues that there was no showing that Synar was injured on any specific piece of equipment and no showing he was injured on the equipment tested by Kress. UP also relies oil the testimony of railroad employees stating that Synar never complained about the equipment and that the hand brakes and switches were well maintained.

The statute establishes a standard of "in whole or in part" causation which replaces the common law standard of proximate causation. *See* 45 U.C.S.A. § 51; *Rogers v.*

Missouri Pac. R.R. Co., 352 U.S. 500, 507, 77 S. Ct. 443, 449, 1 L. Ed. 2d 493 (1957), With regard to causation, an FELA case presents the single question of whether there is any probative evidence to support a finding that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. *Rogers*, 352 U.S. at 506, 77 S. Ct. at 448. The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may reasonably make that inference. *Rogers*, 352 U.S. at 508, 77 S. Ct. at 449. If that test is met, the judge is bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. *Rogers*, 352 U.S, at 507, 77 S. Ct. at 449.

The evidence UP would have us consider on this issue is not controlling. Our research revealed no legal basis to require Synar to prove he was injured on a particular piece of equipment and UP directs us to no such authority. While there was testimony that Synar never complained about the equipment and that the hand brakes and switches were well maintained, there was also testimony to the contrary. It was for the jury to decide which testimony to believe. *See Beall*, 867 S.W.2d at 796. In addition to the testimony that railroad equipment was not well maintained, we look to the medical evidence to resolve the issue of causation.

Dr. Charles Fullenwider, a neurosurgeon who lead examined Synar, explained that the relatively constant, exertional and repetitive use of hands and arms in an occupational setting arc risk factors for development of ulnar neuropathy. The jury heard testimony from several different witnesses regarding the repetitive nature of Synar's job tasks. Dr. Fullenwider also testified that Synar's work was likely a major causative factor leading to his injuries. Dr. Lutton testified that Synar's work factors are the most probable

explanation as to the cause of his injury. Dr. James Slater, the orthopedic surgeon who performed Synar's surgeries, testified that, with reasonable medical certainty, he would attribute Synar's injuries to his work on the railroad. This is enough probative evidence from which the jury may with reason make the inference that UP's negligence caused Synar's injury. *See Rogers*, 352 U.S. at 508, 77 S. Ct. at 449, Under these circumstances, the judge was bound to find that a case for the jury has been made out. *Rogers*, 352 U.S. at 507, 77 S. Ct. at 449. Accordingly, the judge; properly submitted question number one to the jury, the evidence is legally sufficient to support the jury's answer to question number one, and the trial court properly denied UP's motions for directed verdict and for judgment notwithstanding the verdict as to negligence. Pursuant to applicable law, we shall not address UP's factual sufficiency complaints. *Roberts*, 481 S.W.2d at 800. We overrule issues seven through eleven.

INTERSTATE COMMERCE

In its twelfth and thirteenth issues, UP contends the trial court erred in denying its motions for directed verdict and for judgment notwithstanding the verdict by which UP requested judgment on the ground that Synar presented no evidence that UP was a common carrier engaged in interstate commerce. UP also contends that Synar failed to present evidence that he was engaged in interstate commerce at the time of the incident for which suit was brought.

Standard of Review

In attacking the denial of its motions for directed verdict and for judgment notwithstanding the verdict, UP must show there is no evidence to support the rulings. *Mancorp, Inc.*, 802 S.W.2d at 227-28; *Lochinvar Corp.*, 930 S.W.2d at 187. The reviewing court considers only the evidence and inferences tending to support the teal court's ruling. *War-Mart Stores, Inc.*, 968 S.W.2d at 936.

Applicable Law

To recover under FELA, the plaintiff must prove that the defendant is a common carrier engaged in interstate or foreign commerce and that the plaintiff suffered the injury while employed in such commerce. 45 U.S.C.A. § 51; *Hallaway v. Thompson*, 148 Tex. 471, 226 S.W.2d 816, 819 (1950). The employee must show that his duties at least in part are in the furtherance of interstate or foreign commerce or that they affect such commerce directly or closely and substantially. *Id.* at 824 (on reh'g). It is enough if any part of the employee's duties further or affect interstate commerce. *Reed v. Pennsylvania R.R. Co.*, 351 U.S. 502, 506, 76 S. Ct. 958, 962, 100 L. Ed. 1366 (1956). A railroad is engaged in interstate commerce when it carries an article from one state to another and the character of the commerce continues without cessation, until such article reaches its destination. *Louisville & Nashville R. R. Co. v. Meadors' Adm'r*, 197 S.W. 440, 441 (Ky. 1917).

Discussion

Initially, we note that UP did not, at trial, raise the issue of Synar's failure to prove that he was engaged in interstate commerce at the time he was injured. To the extent UP now complains of that issue, the complaint is waived. TEX. R. APP. P. 33.1. However, the record supports a trial court ruling denying such a motion on the issue of whether both UP and Synar were engaged in interstate commerce at the time Synar was injured.

Gary Scott, UP's highest management official in Muskogee explained that, as Manager of Terminal Operations, he oversees an area from Wagner, Oklahoma to Van Buren, Arkansas. David Hoaglan, a UP foreman general, testified that he was responsible for an area spanning three states, Oklahoma, Kansas, and Arkansas. Jerrold Garretson testified that trains came into the Muskogee yard from Kansas and

Texas, as well as from other Oklahoma yards. Synar testified that, while in UP's employ, he worked in Oklahoma, Kansas, Texas, and Louisiana. Synar explained that, while working iii the Muskogee yard, he "built fields" for the North Platt Fort Worth train, and for a northbound train, in addition to building the Pryor and Tulsa, Oklahoma locals, Paul Goodie confirmed that the men on Synar's shift had to separate some cars from through freights and switch those cars to other tracks. Freddy Lowrance testified that the cars that carne into the Muskogee yard that Synar used to make up the Tulsa and Pryor locals arrived from all points on the railroad, including California, Wyoming, and "the east." On Lowrance's shift, they ran trains to Texas, Kansas, and Arkansas.

This evidence shows that UP operates in several different states and moves its trains from one state to another in interstate commerce. Further, the cars Synar stopped, switched, and moved cane from states oilier than Oklahoma and some were destined for states other than Oklahoma. When he built fields for the through freights, which were destined for other states, Synar engaged in interstate commerce even if the cars he moved were destined only for other locations within Oklahoma. *See Baltimore & O.R. Co. v. Darling*, 3 F.2d 987, 987-88 (6th Cir. 1925) (Yard brakeman injured on intrastate car while building an interstate train was engaged in interstate commerce for purposes of FELA,); *Pennsylvania R.R. Co. v. Morrison*, 3 F.2d 986, 986-87 (6th Cir. 1925) (All movements of interstate cars, including a switching movement within one yard, form a part of the entire interstate transportation.); *McCall v. Pitcairn*, 6 N.W.2d 415, 421 (Iowa 1942) (Because an interstate train in a switching yard retains its interstate character, a switchman injured in the process of adding cars to that train is covered by FELA.); *Rogers v. Mobile & Ohio R.R. Co.*, 85 S.W.2d 581, 585-86 (Mo.), *cert, denied*, 296 U.S. 642 (1935) (where an interstate train picks up or sets out cars at a railyard, such action is incident to interstate transportation, whether the individual cars arc interstate or

local in character.). Accordingly, although Synar's main duty may have been to make up two local trains, he was also involved in furthering interstate transportation. Synar's injury was caused by the repetitive use of his arm over the course of many years during which time he moved both interstate and intrastate cars. Considering the nature of the injury as well as the constantly changing interstate/intrastate character of his work, we conclude that Synar met his burden to show that he and UP were engaged in interstate commerce at the time of his injury. The record presents some evidence of probative force supporting the trial court's denial of UP's motions for directed verdict and for judgment notwithstanding the verdict on the issue of whether UP was a common carrier engaged in interstate commerce at the time of the injury and whether Synar was engaged in interstate commerce at the time of the injury. Accordingly, we overrule UP's issues twelve and thirteen.

FEDERAL SAFETY APPLIANCE ACT

Background

Synar alleged in his petition that UP, in violation of the FSAA, used rail cars that were not equipped with efficient hand brakes. In question four of the charge, the jury was asked if the failure, if any, of UP to provide cars in proper condition and safe to operate without unnecessary danger of personal injury was a cause of the occurrence in question. The accompanying instruction set out the text of the hand brake provision of the FSAA as it read before the 1994 recodification: "It shall be unlawful for any common carrier subject to the provisions of . . . this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with . . . efficient hand brakes." Also, it defined "inefficient" as "not producing or not capable of producing the desired effect, incapable, incompetent or inadequate." The jury answered, "yes" to question four.

UP filed a motion for judgment notwithstanding the verdict or alternatively to disregard special issues. UP argued that there was no evidence that any car caused any injury to Synar. Further, UP argued that the FSAA does not apply to switching operations because switching does not constitute hauling or use on a line. It also argued that the answer to question four should be disregarded because Synar did not identify a particular, defective hand brake that caused his injuries. The trial judge explained on the record that he agreed that the FSAA does not apply to switching operations and, therefore, Synar did not show that the allegedly defective cars contributing to his injury were being used on UP's line as required by the FSAA and that Synar must, but did not, identify a particular defective hand brake. The trial judge disregarded the jury's answer to question four thereby denying Synar recovery under the FSAA. As a result, FELA section 53, in conjunction with the jury's finding that Synar was thirty percent contributorily negligent, required the trial judge to deduct thirty percent of the jury's total award. *See* 45 U.S.C.A. § 53 (West 1986); Rogers, 352 U.S. at 507 n.113, 77 S. Ct. at 449 n.13.

Standard of Review

A trial court may disregard a jury's findings and grant a motion for judgment notwithstanding the verdict, when the evidence is conclusive and one party is entitled to judgment as a matter of law. *Mancorp, Inc.*, 802 S.W.2d at 227-28. We must review the record in the light most favorable to the jury findings, considering only the evidence and inferences which support the findings and rejecting the evidence and inferences contrary to the findings. *Id.* at 227. If there is more than a scintilla of competent evidence to support the jury's finding, then the judgment notwithstanding the verdict will be reversed. *Navarette v. Temple Indep. Sch. Dist.*, 706 S.W.2d 308, 309 (Tex. 1986).

Applicable Law

The Safety Appliance Act imposes absolute liability on railroad carriers for violations of that act's safety standards. *Myers v. Reading Co.*, 331 U.S. 477, 482, 67 S. Ct. 1334, 1337, 91 L. Ed. 1615 (1947). Pursuant to the FSAA, a railroad is required to use only cars equipped with efficient hand brakes. 49 U.S.C.A. § 20302(a)(I)(B) (West 1997).[1] A railroad may be found liable for a violation of the FSAA if the jury reasonably can infer from the evidence that the hand brake which caused the injuries was on a car which the railroad was then using on its line, in interstate commerce, and that the brake was not an efficient hand brake. *Myers*, 331 U.S. at 482-83, 67 S. Ct, at 1338. An inefficient hand brake is one that fails to function properly. *Myers*, 331 U.S. at 483, 67 S. Ct. at 1338.

Switching Operations

In his first issue, Synar contends the trial court erred in determining that the Safety Appliance Act does not apply to switching operations and, therefore, he cannot recover under the FSAA. He further contends the trial court erred in disregarding the jury's answer to question four, by which the jury found the railroad violated that act, and in reducing the jury's award accordingly.

Synar's FSAA cause of action is based on an injury allegedly occurring solely while he performed switching operations, UP relies on a recent case from the Fourth Circuit, *Phillips v. CSX Transportation, Inc.*, 190 F.3d 285 (4th Cir. 1999), *cert. denied,* 529 U.S. 1004 (2000), to support its

---

[1] The Safety Appliance Act was recodified in 1994. However, Congress intended merely to restate, without substantive change, laws previously enacted. It declared that the new provisions may not be construed as making a substantive change in the laws replaced. Pub. L. No. 103-272, § 6 108 Stat. 881 (1994). Accordingly, we rely on cases issued before and after the 1994 recodification.

argument that the FSAA does not apply to switching operations. Phillips was, at the time of his injury, engaging the hand brakes on a completed train prior to turning the train over to the car department for its predeparture inspection. He was injured when the hand rail he held on to gave way and he fell to the ground. Based on its interpretation of other case law, the Fourth Circuit started with the premise that the FSAA does not apply to switching operations because, it determined, those activities do not fall within the definition of "in use" under the act. *Id.* at 289.

The focal point of the opinion was not whether the FSAA applies to switching operations, but rather, the court's discussion o f whether the train was involved in switching operations or whether it was "in use" under the FSAA at the time of Phillips' injury. The court characterized the key issue in the case as "[d]etermining the point at which switching operations end and a train becomes 'in use,' *Id.* Considering where the train was located at the time of the accident and the activity Phillips was engaged in at the time of the injury, the court concluded that he was injured at the end of the switching process, rather than at the beginning of the departure process. With the conclusion that switching operations do not fall within the definition of "in use" as its foundation and starting point for analysis, the court held that the train upon which Phillips was injured was not in use at the tune of his injury, Therefore, Phillips could not recover on his FSAA claim. *Id.* at 289-90. As we shall explain, we conclude that *Phillips* is based on a faulty premise.

Air-brakes and hand brakes are addressed separately within the FSAA. Section 20302(a)(1)(B) requires vehicles to be equipped with efficient hand brakes. 49 U.S.C.A. § 20302(a)(1)(B). "Vehicle" is defined as a car, locomotive, tender, or similar vehicle. 49 U.S.C.A, § 20301(a) (West 1997). Section 20302(a)(5) requires trains to be composed of enough vehicles equipped with power or train brakes

so that the train's speed can be controlled without the use or hand brakes, 49 U.S.C.A. § 20302(a)(5)(A). Thus, the FSAA makes a distinction between trains, which are stopped with the use of air-brakes, and cars, which are stopped with the use of hand brakes. *See* 49 U.S.C.A. § 20302(a); *United States v. Erie R.R. Co.*, 237 U.S. 402, 407-08, 35 S. Ct. 621, 624, 59 L, Ed. 1019 (1915). In railroad yards, incoming trains are broken up and cars are assembled and coupled into outgoing trains. *Erie R.R. Co.*, 237 U.S. at 408, 35 S. Ct. at 624. Use of the air-brake system is impracticable in railroad yards. *Grand Rapids & I. Ry. Co. v. United States*, 249 F. 650, 653 (6th Cir. 1918). Accordingly, yard movements, which are switching operations, are not within the air-brake provision. *Erie R.R. Co.*, 237 U.S. at 408, 35 S. Ct. at 624. In contrast, the hand brake provision is ascribable to the necessity of controlling the movements of cars its yards and elsewhere, when trains have been broken up or arc being made up. *United States v. Great N. Ry. Co.*, 229 F. 927, 930 (9th Cir. 1916). With this law in mind, we consider the *Phillips* opinion.

The *Phillips* court broadly stated that "the FSAA does not apply to train oars involved in switching operations" and cited three cases, none of which stand for that proposition. *Phillips*, 190 F.3d at 289. Those three cases are *United States v. Seaboard Air Line Railroad, Co.*, 361 U.S. 78, 80 S. Ct. 12, 4 L. Ed. 2d 25 (1959), *United States v. Northern Pacific Railway Co.*, 254 U.S. 251, 41 S. Ct. 101, 65 L. Ed. 249 (1920), and *Trinidad v. Southern Pacific Transportation Co.*, 949 F.2d 187 (5th Cir. 1991). In *Seaboard Air Line Railroad*, the railroad had been cited for failure to comply with the air-brake provisions while moving trains within a yard. Accordingly, the Supreme Court was applying the air-brake provisions when it distinguished "train movements" from "switching operations." *Seaboard Air Line R.R. Co.*, 361 U.S. at 80, 80 S. Ct. at 14. The Court pointed out that there is no "train" in a true "switching" operation and held that, while

the complained-of movements took place in a yard, the case involved train movements subject to the air brake provisions. *Seaboard Air Line R.R. Co.*, 361 U.S. at 82, 80 S. Ct. at 15. We should not imply that the hand brake provision does not apply to switching operations merely because the air-brake provision does not.

Likewise in *Northern Pacific*, the Supreme Court considered whether the provision of the FSAA requiring a certain percentage of the train's air-brakes to be coupled so as to be under engine control applied to two transfer trains. It held that "[a] moving locomotive with cars attached is without the provision of the act only when it is *not* a train; as where the operation is that of switching, classifying and assembling cars within railroad yards for the purpose of making up trains." *Northern Pac.*, 254 U.S. at 254-55, 41 S. Ct. at 102. We conclude that the logical interpretation of the phrase "the provision of the act" is that it is a reference to the air-brake provision since that is the provision at issue in the case. Again, we shall not imply that the hand brake provision does not apply merely because the our-brake provision does not.

Finally, the *Phillips* court relied on *Trinidad*, a Fifth Circuit case also applying the air-brake provisions of the FSAA. The *Trinidad* court determined that the air-brake provisions, the only provisions relied on by the plaintiff, did not apply. It reasoned that the train, which was assembled in Southern Pacific's yard, had not been released because of an incomplete inspection and had not, therefore, passed from the assembly phase to the "in use" phase. *Trinidad*, 949 F.2d at 189. Specifically, referencing sections one and nine, the old FSAA section numbers containing the airbrake provisions, the court stated that, because the train was not in use, it was not covered by the train brake provisions of the Act. *Id.* The *Trinidad* court did not comment on the applicability of the hand brake provision to any given situation.

In short, the cases relied on in *Phillips* to support its holding that switching operations do not fall within the definition of "in use" under the FSAA do not support that holding. We shall now review other pertinent case law.

As the Fourth Circuit has previously stated, "[t]he purpose of the law is the guide to its interpretation." *Virginian Ry. Co. v. United States*, 223 F. 748, 751 (4th Cir.1915). Further, "[t]he beneficial and remedial purposes of these statutes must not be defeated by strained construction." *Id.* at 752. The controlling test of the statute's application lies in the essential nature of the work clone. *United States v. Chicago, Burlington & Quincy R.R. Co.*, 237 U.S. 410, 413, 35 S. Ct. 634, 636, 59 L. Ed. 1023 (1915). Significantly, the purpose of the FSAA is to promote the safety of employees and travelers and the statute should be liberally construed as a safety measure. *Seaboard Air Line R.R. Co.*, 361 U.S. at 83, 80 S. Ct. at 16; *Delk v. St. Louis & San Francisco, R.R. Co.*, 220 U.S. 580, 582, 31 S. Ct. 617, 619, 55 L. Ed. 590 (1911).

In construing the FSAA, it is appropriate to consider the context in which the individual provisions of the statute must be applied. For instance, in determining the applicability of the airbrake provision to transfer trains running on a main track between two yards, the Supreme Court has noted that the trains were exposed to the hazards which the air-brake provision was intended to avoid or minimize. *See Chicago, Burlington & Quinsy R.R. Co.*, 237 U.S. at 412, 35 S. Ct. at 635. Although these "trains" were merely made up of cars being moved from one yard to another, they came within the air-brake requirement. *Id.* Thus, the Court focused on furthering the FSAA's purpose of promoting safety.

Interpretation and application of a provision of the FSAA that is similar to the hand brake provision provides guidance. Section 20302(a)(1)(A) requires vehicles to be equipped with automatic couplers. 49 U.S.C.A, § 20302(a)(1)(A). Finding that the car in question was being used in interstate traffic

when the plaintiff was injured, courts have repeatedly held that the FSAA applies in cases where the plaintiffs injury, incurred while the plaintiff was engaged in switching operations, resulted from a defective coupler. *See Great N. Ry. Co. v. Otos*, 239 U.S. 349, 351, 36 S. Ct. 124, 125, 60 L. Ed. 322 (1915); *Delk*, 220 U.S. at 585-86, 31 S. Ct. at 620; *United States v. Houston Belt & Terminal Ry. Co.*, 210 F.2d 421, 424 (5th Cir.1954); *Erie R. Co. v. Russell*, 183 F. 722, 724-25 (2d Cit. 1910), *error dismissed, cert. denied*, 220 U.S. 607 (1911).

Further, at least four jurisdictions have applied the FSAA in cases involving injuries occurring during switching operations and allegedly caused by defective hand brakes. However, we note that the applicability of the FSAA was neither questioned nor discussed in these cases. *See Texas & Pacific Ry. Co. v. Griffith*, 265 F.2d 489 (5th Cir. 1959); *Missouri-K.-T. R.R. Co. v. Ridgway*, 191 F.2d 363 (8th Cir.1951); *Hosman v. Southern Pac. Co.*, 83 P.2d 88 (Cal. App. 1938), *cert. denied*, 306 U.S. 656 (1939); *Didinger v. Pennsylvania R.R. Co.*, 39 F.2d 798 (6th Cir.1930).

It is because safety in the yard during switching operations requires efficient hand brakes that Congress passed the hand brake provision. *Robb v. Burlington N. & Santa Fe Ry. Co*, 100 F.Supp. 2d 867, 870-71 (N.D. Ill. 2000). As other courts have considered during discussions of this issue, if the "efficient hand brakes" provision of the FSAA does not apply during switching operations, it is difficult to see when it would ever apply. *Williams v. Norfolk So. Ry. Co.*, 126 F. Supp.2d 986, 992 (W.D. Va. 2000); *Robb*, 100 F. Supp. 2d at 870, Further, there is no provision of the statute or any exception carved out by case law excluding employees who work in switching yards. On the contrary, the Supreme Court has held that a railroad employee's designation as yard or switching crew was not material. The controlling test of the statute's application lies in the nature of the work done.

Chicago, Burlington & Quincy R.R. Co., 237 U.S. at 413, 35 S. Ct. at 636. Generally speaking, the cars and railroad employees in the yard are exposed to the hazards which the provision requiring efficient hand brakes is intended to avoid or minimize. *See Chicago, Burlington & Quincy R.R. Co.*, 237 U.S. at 412, 35 S. Ct. at 635. Efficient hand brakes are a necessary safety measure in rail yards. Accordingly, construing the hand brake provision as a safety measure would lead us to apply that provision to switching operations.

We conclude that the hand brake provision of the FSAA applies to the switching activities Synar was engaged in when injured. Therefore, it is improper to say that UP was entitled to judgment as a matter of law on Synar's FSAA claim. *See Mancorp, Inc.*, 802 S.W.2d at 227-28. The attempt to exempt switching activities was actually an attack on the sufficiency of the evidence to prove the cars on which Synar was injured were "in use" at the time of the injury. There is no dispute that the cars were involved in switching operations. As switching operations constitute "use" under the FSAA, the record shows there is more than a scintilla of competent evidence to support the jury's finding in answer to question four. *See Navarette*, 706 S.W.2d at 309. Accordingly, the trial court erred in disregarding the jury's affirmative answer to question four based on the reasoning that the FSAA does not apply to switching operations. We sustain Synar's first issue.

Identification of Defective Hand Brakes

In his second issue, Synar contends the trial court erred in determining that he must identify the specific defective hand brakes that caused his injury and in disregarding the jury's answer to question four because he failed to do so. Synar asserts that the evidence shows the hand brakes on the cars in the Muskogee yard were inefficient and caused injuries. He further argues that the trial court's ruling on this issue is contrary to legislative intent and impermissibly denied him

his right to trial by jury on this issue. Also, Synar argues that the trial court's conclusion is illogical and impracticable based on the nature of the injury and that its reasoning is internally inconsistent with its reasoning for not disregarding the jury's answer on the FELA cause of action.

The FSAA itself does not specifically state a requirement that the plaintiff identify the sped lie defective hand brake that caused his injury. *See* 49 U.S.C.A. § 20302. UP relies on the Supreme Court's *Myers* case and a Seventh Circuit case, *Richardson v. Consolidated Rail Corp.*, 17 F.3d 213 (7th Cir.1994), for the proposition that Synar "bears the burden of establishing that a particular hand brake failed to work efficiently and properly." we do not agree that either case stands for that proposition.

In *Myers*, the Supreme Court explained that there are two recognized methods of showing the inefficiency of hand brake equipment. The plaintiff may introduce evidence showing some particular defect or evidence showing a failure to function. *Myers*, 331 U.S. at 483, 67 S. CL at 1338. The *Myers* court did not require the plaintiff to identify a particular hand brake. The Seventh Circuit, in *Richardson*, addressed the question of whether the jury could consider evidence of a hand brake's condition before and after the incident during which the plaintiff was injured. In determining that the jury could consider such evidence, the *Richardson* court did not state that the plaintiff had to identify a specific, defective hand brake, *See Richardson*, 17 F.3d at 216-17. Although the plaintiff in both of these cases was injured on a single, identified car and therefore the specific defective brake was identified, the question now before us was not addressed by these cases.

Finding no cases that address the specific file question before us, we turn to the Supreme Court for guidance in construing the FSAA. We start with the basic proposition that the FSAA is to be liberally construed in the light of its prime

purpose, the protection of employees and others by requiring the use of safe equipment. *Lilly v. Grand Trunk W. R.R. Co.*, 317 U.S. 481, 486, 63 S. Ct, 347, 351, 87 L. Ed. 411(1943). The case of *Urie v. Thompson*, in which the Supreme Court addressed the question of the extent of coverage of FELA and the Boiler Inspection Act, is instructive and we shall borrow from its reasoning. *See Urie*, 337 U.S. at 180-95, 69 S. Ct. at 1030-37.

Liability for a violation of the FSAA springs from the fact that it is unlawful to use cars not equipped as required. *Urie*, 337 U.S. at 195 n.34, 69 S. Ct. at 1037 n.34. The wording of the statute is not restrictive. Requiring a plaintiff with a repetitive trauma injury, alleged to have been caused by use of hand brakes on hundreds of railroad cars over the course of many years, to identify specific defective hand brakes would make recovery for that plaintiff impossible. This would result in the elimination of an entire subset of plaintiffs us from the purview of the statute's benefit. Construing the FSAA to require such specific identification would therefore defeat the intent of Congress in passing the FSAA. The FSAA is to facilitate employee recovery, not defeat it. *Urie*, 337 U.S. at 189, 69 S. Ct. at 1034. It would not make sense to designate violation of the statute as a per se violation and then contract the scope of compensable injuries thereby defeating recovery for an entire group of plaintiffs. *Urie*, 337 U.S. at 190, 69 S. Ct. at 1034-35. When the acts of the railroad impair an employee's health by requiring him to work under conditions likely to bring about harmful consequences, the injury is just as valid and compensable when it follows a course pursued over an extended period of time as when it happens suddenly, *See Urie,* 337 U.S, at 186-87, 69 S. Ct. at 1033. We conclude that the FSAA sloes not require Synar to identify specific hand brakes that contributed to his injury. Accordingly, the trial court erred in disregarding the Jury's answer to question four based on the reasoning that Synar failed to identify the specific hand brakes that caused his injury. We sustain

Synar's second issue and reinstate the jury's affirmative answer to question four, finding UP liable under the FSAA.

Sufficiency of the Evidence

UP asserted alternatively in its first cross-point that there was no evidence to support the jury's answer to question four. The focus of this cross-point is UP's assertion that question four was improperly submitted because it tracks the language of the Boiler Inspection Act. However, UP did not argue its no evidence issue under this cross-point. It is not clear whether UP is asserting there is no evidence to support an affirmative finding that it violated the FSAA or whether it asserts there is no evidence to support an affirmative finding that it violated the Boiler Inspection Act, As we explain below, question four properly presented the FSAA claim to the jury. The rules require parties to discuss the facts and the authorities upon which they rely to maintain their issues. TEX. R. APP. P.38.1(h). Mere assertions of error, without argument or authority, waive error. *Jones v. Texas Pac. Indent. Co.,* 853 S.W.2d 791, 796 (Tex. App.-Dallas 1993, no writ) (on reh'g). To the extent UP complains in its first cross-point that there is no evidence to support the jury's answer, that complaint is waived. However, our discussion of UP's second cross-point speaks to this issue.

In its second cross-point, UP contends the evidence is insufficient to support the jury's answer to question four. UP complains that Synar did not identify a particular defect, a specific failure to function, or the particular hand brake that caused him injury, Additionally, UP contends Synar did not prove the hand brakes which caused his injury were on a car UP was using on its line or that UP was engaged in interstate commerce at the time of the alleged injury.

We have already addressed the question of whether Synar had to identify a particular hand brake that caused his injury and determined that the statute does not require such

specificity in this type of case. *See generally Urie*, 337 U.S. at 183-91, 69 S. Ct. at 1031-35. We have also considered the question of whether Synar was injured on cars used on UP's line. We determined that switching operations fall within the meaning of the phrase in use on the carrier's line and there is no question that Synar was engaged in switching operations at the time he was injured. Therefore, the record shows he was injured by hand brakes on cars which UP was then using on its line. *See Robb*, 100 F.Supp. at 870-71. Likewise, we have considered the issue of whether UP was engaged in interstate commerce and we determine that the record shows that UP was so engaged. *See Darling*, 3 F.2d at 987-88. Finally, we now consider whether the record also supports a finding that Synar was injured on inefficient hand brakes on UP's cars.

Synar had worked as a switchman and brakeman for more than fifteen years at the time his injuries were diagnosed. Synar testified that he set seventy-five to one hundred hand brakes a day. He estimated that about thirty percent of the hand brakes he encountered required a lot of force and two hands to set. Gerald Garretson, a UP employee, testified that about thirty percent of hand brakes on cars in the Muskogee yard are defective. Douglas Hammer, who worked as a brakeman in the Muskogee yard, testified that ten to fifteen percent of the hand brakes that had to be tied were extremely hard to tie. Some brakes required both hands and feet. Dr. Kress's test showed that the amount of force required to manipulate the hand brake tested was in excess of the recommended weight loads. Kress testified that Gary Scott, UP's highest ranking management official in Muskogee, told hint that the hand brake he tested was representative of all hand brakes on cars in the Muskogee yard. However, Scott testified that the cars Kress tested were not representative of the cars in the Muskogee yard. Quentin Pickering, Synar's expert witness, stated that in his opinion, hand brakes requiring excessive force to set are defective and inefficient.

Scott, who testified that the cars in the Muskogee yard are inspected regularly and well-maintained, explained that a defective hand brake is one that will not tighten the brake. He also stated that UP employees are told not to use excessive force to tighten hand brakes. In response to Pickering's testimony, Scott denied that between one-third and two-thirds of all hand brakes on cars in the Muskogee yard were defective.

Thus, the jury had before it evidence that, over a period of many years, Synar set many hand brakes and that up to approximately one third of them were difficult to set. Some witnesses considered those brakes to be defective while Scott asserted that a hand brake is not considered defective unless it will not tighten. The jury also heard evidence that the cars in the Muskogee yard were well-maintained and that not many hand brakes were defective. It is for the jury to resolve conflicts in the evidence. The jury reasonably could infer that at least some of the hand brakes Synar had to set were not efficient. *See Myers*, 331 U.S. at 484, 67 S. Ct. at 1339. Accordingly, the evidence supports the jury's answer to question four. We overrule UP's second cross-point.

CHARGE ERROR

Question Four

In its first cross-point, UP asserts that, assuming the trial court improperly disregarded question number four, Synar is not entitled to judgment on his FSAA claim because the issue was improperly submitted to the jury. UP complains that question four tracks the language of the Boiler Inspection Act, not the FSAA. Further, it contends the trial count erred in failing to ask whether UP had violated the FSAA generally or whether UP used on its line cars equipped with inefficient hand brakes. UP asserts that there was no issue submitted on the FSAA and the jury's answer to question four had no legal effect.

Applicable Law

Trial courts have broad discretion in formulating a charge by which to submit disputed issues to the jury. *Varme v. Gordon,* 881 S.W.2d 877, 881 (Tex. App.–Houston (14th Dist,] 1994, writ denied). The trial court must, whenever feasible, submit the cause upon broad-form questions and must give proper instructions and definitions to enable the jury to render a verdict, TEX. R. CIV. P. 277. If the jury charge resolves the controlling issues raised by the pleadings and any evidence in a feasible manner that does not confuse the jury, no error occurs. *Friday v. Spears,* 975 S.W.2d 699, 700 (Tex. App.–Texarkana 1998, no pet.).

The standard of review on appeal for charge error is whether the trial court abused its discretion. *Texas Dept. of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) (on reh'g). Abuse of discretion occurs only when the trial court acts without reference to any guiding principle. *Id.* An appellate court may not substitute its judgment for that of the trial court, but must determine whether the trial court's action was arbitrary or unreasonable. *McFarland v. Sanders*, 932 S.W.2d 640, 644 (Tex. App.–Tyler 1996, no writ). We must consider the pleadings of the parties, the evidence presented at trial, and the charge in its entirety. *Island Recreational Dev. Corp. v. Republic of Texas Sav. Ass'n,* 710 S.W.2d 551, 555 (Tex. 1986) (on reh'g).

Discussion

A railroad may be held liable for a violation of the FSAA if the jury can reasonably infer from the evidence that the hand brake which caused the injuries was on a car which the railroad was using on its line, in interstate commerce, and that the brake was not an efficient hand brake. *Myers,* 331 U.S. at 482-83, 67 S. Ct. at 1338. In question four, the jury was instructed that a common carrier that is subject to the provisions of the FSAA violates the FSAA if it hauls, permits

to be hauled, or uses on its line any car with an inefficient hand brake. Question four asked the jury if UP's failure, if any, to provide cars in proper condition and safe to operate was a cause of Synar's injury.

UP asserts that question four tracks the language of the Boiler Inspection Act, 49 U.S.C.A. § 20701 (West 1997). That statute provides:

> A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its pans and appurtenances—
>
> (1) are in proper condition and safe to operate without unnecessary danger of personal injury;
>
> (2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and
>
> (3) can withstand every test prescribed by the Secretary under this chapter.

Id. The only similarity between question four and the Boiler Inspection Act lies in the fact that they both contain the phrase "in proper condition and safe to operate without unnecessary danger of personal injury." As it is the purpose of the Safety Appliance Act to promote safety by ensuring that each car is properly equipped, we see no error in borrowing the phrase. Further, the instructions accompanying question four track the language of the Safety Appliance Act as it read prior to the 1994 recodification. *See* 45 U.S.C.A. § 11 (West 1986) (current version at 49 U.S.C.A. § 20302). Although the charge did not specifically track the current version of the FSAA, the jury was adequately and correctly informed of the relevant law which enabled it to reach a verdict. *See* 49 U.S.C.A. § 20302; *Myers*, 331 U.S. at 482-83, 67 S. Ct. at 1338. Further, the question and instructions were not misleading, confusing, or prejudicial, We conclude that

the question and accompanying instructions, taken together, properly submitted this issue to the jury. Accordingly, the trial court did not abuse its discretion in submitting question four and the jury's answer constitutes a finding that UP violated the provisions of section 20302 of the FSAA. *See Friday*, 975 S.W.2d at 700. We overrule UP's first cross-point.

UP's Requested Jury Instructions

a. Limitations

In its sixth issue, UP asserts that the trial court erred in failing to give UP's requested question number four, on the issue of limitations, and erred in submitting question number five as it was worded. UP contends that question number five erroneously placed the burden of proof on UP. It further contends that question was confusing and should have only inquired whether Synar did not know that his injury was work related prior to a day certain.

Applicable Law

While the substantive law contained injury instructions in FELA cases is federal and should not vary whether the case is tried in state or federal court, the instructional format is procedural and is a matter for the state to regulate. *Dutton v. Southern Pac. Transp.*, 576 S.W.2d 782, 784 (Tex. 1978). Trial courts have broad discretion in formulating a charge by which to submit disputed issues to the jury. *Varme*, 881 S.W.2d at 881. The trial court must, whenever feasible, submit the cause upon broad-form questions and must give proper instructions and definitions to enable the jury to render a verdict. TEX. R. CIV. P. 277. The trial court should submit instructions only when it determines that the instructions will help the jury to understand the meaning and effect of the law and the presumption created thereby. *City of Austin v. Houston Lighting & Power Co.*, 844 S.W.2d 773, 794 (Tex. App.-Dallas 1992, writ denied).

Discussion

Question five as submitted asked the jury the following question: "On what date did Kenneth Synar first become possessed of the critical facts of his alleged work related injury and: its causation?" It was followed by this instruction: "Critical facts are those that either did or in the exercise of ordinary care should have placed him on notice that work related activities were causing injury, if said activities did cause injury." The jury answered "2/18/94."

UP's requested question and instruction on the issue of limitations was as follows:

Did plaintiff know has condition was work-related or should he have been reasonably aware of the critical facts of his alleged injury and its causation prior to September 29, 1992? A critical fact causing a claim to accrue can be an event that should put Plaintiff on notice to check for injury even if the event is only minor.

Question five merely asked the jury to determine when Synar had enough information to know his injuries were caused by his work at the railroad. This instruction accurately reflects the law on accrual in FELA cases. A claim accrues when the claimant should reasonably have been aware of the critical facts of injury and causation. *DuBose*, 729 F.2d at 1030. The question as given was open-ended and asked the jury to determine the month, day and year. UP's requested question asked if Synar knew or should have known the same critical facts prior to a date certain. ale discern no substantive difference in this wording. A party cannot complain when the judge submits an issue substantially similar to the one it requested. *Maddox v. Denka Client. Corp.*, 930 S.W.2d 668, 670 (Tex. App.-Houston [1st Dist.] 1996, no writ). Further, we disagree that the question given to the jury placed the burden on UP. It merely asked the jury for a date. Finally, while the last sentence in UP's requested instruction on

limitations, regarding critical facts, is a correct statement of the law, that alone is not a sufficient reason to require the trial court to include it in the charge. *Kansas City So. Ry. Co.* v. *Stokes*, 20 S.W.3d 45, 49 (Tex. App.–Texarkana 2000, no pct.). Because the instruction given accurately reflects the law, the trial court did not abuse its discretion by determining that the jury did not need this expanded explanation of what constitutes a critical fact. *See City of Austin*, 844 S.W.2d at 794. We overrule UP's sixth issue.

b. Negligence.

In its fifteenth issue, UP asserts that the trial court erred in not submitting its requested instructions numbers eight through fourteen and seventeen. UP contends that the trial court's denial of these instructions denied its right to a substantive defense as such instructions are an integral part of what constitutes negligence under FELA.

UP submitted the following requested instructions which the trial court denied:

> Number 8: Plaintiff has sued the Railroad under the Federal Employer's Liability Act, referred to as the FELA. The FELA protects the employee only if they are injured in the course and scone of their employment. Plaintiff cannot recover for injuries that were not sustained in the course; and scope of his employment with the Railroad.
>
> Number 9: In order to recover under FELA, Plaintiff must prove that the Railroad was negligent. Mere proof that the work place is dangerous or a difficult place to work does clot make the Railroad liable without proof of negligence, The Railroad is not held to an absolute responsibility for the reasonably safe condition of the place, tools and appliances, but only to the duty of exercising reasonable care to that end. The fact that an employee is injured is not proof of negligence of the Railroad.

Number 10: Union Pacific had a right to assume that Plaintiff would exercise reasonable care for his own safety and that he would not disobey safety rules and practices.

Number 11: Union Pacific cannot be charged with negligence in this case by failing to anticipate that plaintiff would not take the ordinary and proper precautions to protect and safeguard his health and welfare. As part of their duties, railroad employees must exercise due care for their own safety.

Number 12: In order to prove that the Railroad was negligent in violation of the Federal Employers Liability Act, 45 U.S.C. § 51, *et seq.*, the Plaintiff must prove, by a preponderance of the evidence, that the Railroad knew, or, in the exercise of ordinary cart;, should have known, that a dangerous condition existed.

Under the law, even after proof of an unsafe or defective condition, the Plaintiff must prove that Defendant knew, or in doe exercise of ordinary care, should have known of the unsafe condition, if he is to recover under the Federal Employer's Liability Act, 45 U.S.C. § 51, *et seq.*

Number 13: During all the time he was working, and at the time of the alleged occurrence in question, the law imposed upon plaintiff the duty to exercise reasonable care for his own safety. The Railroad owed him no duty to exercise a higher degree of care for his safety than he owed to himself. The Railroad is not an insurer of the safety of its employees; employees, particularly those working in yards, must as part of their duty exercise due care for their own safety.

Plaintiff was required to exercise reasonable care to protect himself from injury from the ordinary hazards and dangers of his employment not resulting from the Railroad's negligence and to protect himself from injury from such hazards however and whenever they *might be* encountered.

Number 14: The Plaintiff is making a claim under the Federal Employers Liability Act ("FELA"). To recover, the Plaintiff mat prove each, of the following elements by a preponderance of the evidence.

First: That at the time of the Plaintiffs injury, he was an employee of the Defendant performing duties in the course of his employment;

Second: That the Defendant was at such time a common carrier by railroad, engaged in interstate commerce;

Third: That the Defendant was "negligent;" and

Fourth The Defendant's negligence was a "legal cause" of damage sustained by the plaintiff.

Under the FELA, the railroad has a non-delegable duty to furnish a reasonably safe place for employees to work. The Plaintiff claims that the Defendant was negligent in failing to meet its duty tinder the FELA to exercise care to provide hire with a reasonably safe place to work.

Number 17: For Plaintiff to recover for injuries sustained in the course of employment, those injuries must be the requisite precipitating physical injury

The trial court included the following Texas Pattern Jury Charge definitions in the charge:

NEGLIGENCE means failure to use ordinary cane, that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances.

ORDINARY CARE means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances.

By the term CAUSE IN WHOLE OR IN PART, as used in this charge, means a cause which played any part, no

matter how small, in producing the injury for which damages are sought.

The trial court submitted the following questions and instructions on the issue of negligence:

> Question Number 1: Was the negligence, if any, of the Missouri Pacific Railroad Company d/b/a Union Pacific Railroad Company a cause, in whole or in part, of the injuries in question, if any, sustained by Kenneth Synar?
>
> You are instructed that under the Federal Employers' Liability Act, the railroad company was under a continuing, nondelegable duty to exercise ordinary care in providing Kenneth Synar with a reasonably safe place to work, reasonably safe conditions in which to work, and reasonably safe tools and equipment. This duty includes the duty to inspect the premises where the Railroad employees will be working and their equipment. This does not mean that the Railroad is an insurer of the safety of the employee. The extent of the Railroad's duty is to exercise ordinary care under the circumstances to see that the work place and equipment is reasonably safe. This duty exists at all times and applies at all places where the Railroad requires it's employees to work.
>
> Answer "Yes" or "No". The jury answered, yes.
>
> Question Number 2: Was the negligence, if any, of Kenneth Synar a cause, in whole or in part, of the injuries in question, if any, sustained by Kenneth Synar?
>
> You are instructed that the Missouri Pacific Railroad Company d/b/a Union Pacific Railroad Company bears the burden of proof by the preponderance of the evidence (as that term has been previously defined) on the question of Kenneth Synar's negligence, if any. You are instructed that it was the continuing duty of Kenneth

Synar to exercise reasonable and ordinary care for his own safety and protection,

Answer "Yes" or "No". The jury answered yes,

Discussion

Much of what UP requested was included in the charge given, As UP has no actual complaint with regard to those; requests, we will not address them. *See Maddox*, 930 S.W.2d at 670. Requested instruction number eleven has been considered and rejected by the Fifth Circuit, It is a negative instruction which was properly refused as it might confuse the jury, *See Almendarez v. Atchison, Topeka & Santa Fe Ry. Co.*, 426 F.2d 1095, 1097 (5th Cir.1970) (no error in denying request to instruct jury that railroad is not negligent for failing to anticipate employee's carelessness or lack of care).

Requested instruction number twelve focuses on the foreseeability element of FELA, The content of that requested instruction is addressed in the charge as given through the explanation of UP's duty to Synar and the definitions of negligence and ordinary care. The jury was instructed that Up had the duty to "exercise ordinary care under the circumstances" to provide a safe work environment for its employees. The definitions of negligence and ordinary care also referenced the circumstances under which the "person of ordinary prudence" was acting. Forseeability is a part of the "circumstances" to be considered by the jury in determining whether the carrier used ordinary care. *See Gallick v. Baltimore and Ohio R.R. Co.*, 372 U.S. 108, 117-19, 83 S. Ct. 659, 665-66, 9 L.Ed. 618 (1963) (instruction on negligence encompassed foreseeability element). Accordingly, the jury was instructed that if the danger cannot reasonably be foreseen, the law will not impose any liability on the carrier. *See Johnson v. National R.R. Passenger Corp.*, 989 P.2d 245, 248-49 (Colo. Ct. App. 1999) (instruction explaining ordinary care informed jury of foreseeability issue). Specific use of the

word "foreseeability" is not required. *Merando v. Atchison, Topeka & Santa Fe Ry. Co.*, 656 P.2d 154, 162-63 (Kan. 1982). We conclude that the charge as given incorporated the foreseeability issue and thus it was considered by the jury. As the substance of the requested instruction was included in the charge, the trial court did not err in denying the requested instruction.

The element that the plaintiff must, at the time of injury, be an employee of the defendant performing duties in the course of his employment is adequately presented in the instruction accompanying question one. That instruction explained that the railroad had a duty to provide a safe place for Synar and all railroad employees to work. The instruction specifically noted that, while the duty exists at all times and applies to all places the employees work, the extent of this duty is to exercise ordinary care under the circumstances to see that the *work place* and *equipment* aide reasonably safe. Considering the charge as a whole, we conclude the jury would have understood that UP cannot be held liable under FELA for injuries Synar suffered while not performing duties in the course of his employment with UP.

In requested instruction number fourteen, UP set out the elements an FELA plaintiff must prove, including that the defendant is a common carrier by railroad engaged in interstate commerce. As explained above, the record contains evidence showing that UP is a common carrier by railroad engaged in interstate commerce. While UP did file a general denial, it presented no controvert evidence on this issue. A fact issue that is established with uncontrovert evidence and is not in dispute should not be submitted to the jury. *See T.O. .Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 223 (Tex. 1992). Accordingly, as the evidence on this issue was undisputed, the trial court did not err in refusing to submit the issue to the jury.

Finally, in requested instruction number seventeen, UP asked the court to tail the jury that Synar could not recover unless he showed that his injures were the "requisite precipitating physical injury," The trial court is not required to use that exact language. The law in this area is well-settled and the jury should be instructed in accordance with it. The jury should be instructed that it must determine whether the evidence shows that the railroad's negligence played any part, even the slightest, in producing the injury for which damages are sought. *Rogers*, 352 U.S. at 506, 77 S. Ct. at 448. Here, question number one asked if the railroad's negligence was a cause, in whole or in part, of Synar's injuries. The charge defined the term "cause in whole or in part" as a cause which played any part, no matter how small, in producing the injury for which damages are sought. As the charge properly instructed the jury on this issue, the trial court did not err in denying UP's requested instruction number seventeen. We overrule UP's issue fifteen.

DAMAGES

Past Medical Expenses

a. *Admissibility of Evidence*

In its sixteenth issue, UP contends that the trial court erred in admitting Plaintiff's Exhibit 40-A, a document purporting to prove the amount of past medical charges Synar has incurred as a result of his injury. UP argues that the exhibit is inadmissible because it is hearsay that does not fall within any exception, counsel did not lay the proper predicate and did not properly authenticate it, and it is not the best evidence of Synar's medical bills. In its seventeenth issue, UP asserts that, as the jury should not have relied on Exhibit 40-A, in its absence the evidence is legally and factually Insufficient to support the jury's finding of fast medical expenses.

Plaintiffs Exhibit 40-A is entitled "Medical Bills" and lists four doctors, one hospital, and one medical center, the dates

Synar was seen by each doctor or obtained services at each facility, and corresponding charges for services. The total for all services was $16,611.10. At trial, Synar's counsel showed the exhibit to Synar and asked if it was a listing of medical bills for the treatment of his arm, Synar answered, "Yes, it is," There was no further testimony regarding the exhibit or the amount of past medical bills Synar has incurred. In answer to question six(g) the jury awarded $15,473.10 for past medical expenses.

Although UP assorts that the list was compiled by Synar's counsel, and that seems to be a reasonable explanation of its creation, the record does not provide any explanation whatsoever. Spar did not testify as to its origin, its accuracy, its truthfulness, or his personal knowledge of the information contained in the list. The record does not reflect that the underlying records were admissible. Accordingly, Exhibit 40-A was inadmissible hearsay. *See Aquamarine Assocs. v. Burton Shipyard, Inc.*, 659 S.W.2d 820, 821-22 (Tex. 1983).

Further, while Synar may have been attempting to produce a summary pursuant to Texas Rule of Evidence 1006, he did not meet the requirements of that rule. Rule 1 006 provides a method for avoiding the difficulties involved in producing voluminous records to satisfy the best evidence rule by allowing summaries to be placed in evidence, *See* TEX. R. EVID.1006. However, the underlying records must be made available to the opposing party. The record does not reflect whether Synar offered to supply UP with the records from which the information in the list was taken. Further, the sponsoring party must also demonstrate that the underlying records were admissible. *Aquamarine Assocs.*, 659 S.W.2d at 821-22. Accordingly, the trial court abused its discretion in admitting Exhibit 40-A. We sustain UP's sixteenth issue.

b. *Sufficiency of the Evidence*

In its seventeenth issue, UP asserts the jury's answer to question six(g) is not supported by the evidence. In determining whether there is no evidence to support a jury finding, this Court considers only the evidence and inferences that tend to support the finding, disregarding all evidence and inferences to the contrary, *Wal-Mart Stores, Inc.*, 968 S.W.2d at 936. A claim for past medical expenses must be supported by evidence of the amounts charged or paid, and the reasonableness and necessity of those expenses. *Rives v. Garibay*, 974 S.W.2d 93, 95-96 (Tex. App.-San Antonio 1998, pet. denied). Exhibit 40-A was the only proof of past medical charges presented by Synar. That exhibit was inadmissible. Further, while Dr. Slater testified that his fees are reasonable and customary, he did not testify as to the necessity of his fees. In the absence of Exhibit 40-A, the record contains no evidence of the dollar amounts charged by Dr. Slater. Additionally, the record contains no evidence of amounts charged by other doctors and medical facilities or of the reasonableness and necessity of any of those fees. The evidence does not support Synar's claim for past medical expenses. Accordingly, we sustain UP s seventeenth issue, reverse the portion of the judgment awarding Synar damages for past medical expenses, and render judgment that Synar take nothing on his claim for past medical expenses. *See* TEX. R. APP. P. 43.3.

Future Medical Expenses

In its eighteenth issue, UN asserts the trial court erred in submitting question six(h), regarding future medical expenses, because there was no evidence to warrant its submission. UP argues that Synar failed to present any evidence showing a reasonable probability that he would need any future surgery or treatment and there was no evidence of a reasonable probability that Synar would incur medical expenses in the future. Further, it argues, since there was no

credible evidence of past medical, there is nothing upon which to base an award of future medical.

Applicable Law

A trial court may refuse to submit an issue only if no evidence exists to warrant its submission. *Elbaor*, 845 S.W.2d at 243. As this contention is in essence a challenge to the legal sufficiency of the evidence, this court considers only the evidence and inferences tending to support the trial court's ruling. *Wal-Mart Stores, Inc.*, 968 S.W.2d at 936.

To sustain an award of future medical expenses, the plaintiff must show that in all reasonable probability, expenses accruing from his injury will be necessary in the future. *Rosenboom Mach, & Tool, Inc, v. Machala*, 995 S.W.2d 817, 828 (Tex. App.-Houston [1st Dist.] 1999, pet. denied). To make this showing, a plaintiff must prove two distinct elements. First, he must present evidence that he will, in reasonable probability, incur medical expense in the future. *Thate v. Texas & Pac. Ry, Co.*, 595 S.W.2d 591, 601 (Tex. Civ. App.-Dallas 1984, writ dism'd). Second, he must prove the probable reasonable amount of the future medical expense. *Id.* The preferred practice is to have the physician testify with reasonable professional certainty about the kind of services that will be required and the reasonable value of those services. However, the only requirement to support a verdict on this issue is that there be evidence in the record of the reasonable value of past medical treatment and to establish the probable necessity of future medical treatment. *Id.* The plaintiff has the burden of proving with some degree of certainty a factual basis to support the amount o f damages awarded. *McCarley v. Hopkins*, 687 S.W.2d 510, 513 (Tex. App.-Houston [1st Dist.] 1985, no writ).

Discussion

In order to determine whether question six(h) should'havc been submitted to the jury, we must examine the record to see if there is some evidence that Synar will in reasonable probability incur medical expenses in the future and some evidence of the probable reasonable amount of those expanses. The jury heard extensive testimony regarding Synar's injury, including the intermittent, vague symptoms of the early 1990's, the pain and numbness that led him to visit a doctor in 1994, details of the surgeries and the state of the contents of his right arm as revealed during the surgeries, as well as a description of the deteriorated state of his inn and hand at the time of trial. Dr Slater testified that, at the time of trial, he was still seeing Synar. Synar testified that he would be seeing Dr. Slater for at least one to two more years.

Dr. Slater referred to Plaintiffs Exhibit 5, which was a bill for physical therapy and for Dr. Slater's services. Dr. Slater testified that the charges are reasonable and customary. He did not tell the jury the amount of the charges. Plaintiffs Exhibit 5 was not admitted into evidence. The jury had before it plaintiffs Exhibit 40-A, the list of past medical charges Synar incurred. However, we have determined that exhibit was not admissible and should not be considered. Accordingly, while there is slight evidence that Synar will incur medical expenses in the future, there is no evidence establishing the cost of any future medical care. *See Thate*, 595 S.W.2d at 601, We sustain UP's eighteenth issue, reverse the portion of the judgment awarding Synar damages for future medical expenses, and render judgment that Synar take nothing on his claim for future medical expenses. See TEX. R. APP. P. 43.3.

Future Earning Capacity

In its issues twenty-five through twenty-eight, UP asserts the jury's award for future loss of earning capacity should not

stand. It argues that the trial court should not have submitted the issue to the jury, should have granted its motion for directed verdict on the issue, and should have disregarded the jury's answer on the issue. Additionally, it argues that there is no evidence to support the jury's award as to future loss of earning capacity. Generally, UP argues that there is no evidence o f any future loss of earning capacity and no economic testimony from which the jury could arrive at the present value of any loss.

In its twenty-ninth issue, UP asserts the trial court erred in overruling its motion for new trial on the issue of lost future earning capacity. In its motion for new trial, UP argued that the evidence is factually insufficient to support the jury's award for lost future earning capacity, or alternatively, that the award is excessive. It also argued that the evidence is insufficient to show that Synar mitigated his damages.

Applicable Law

The contentions in issues twenty-five through twenty-eight arc in essence the same challenge to the legal sufficiency of the evidence. *See C & R Transport, Inc. v. Campbell*, 406 S.W.2d 191, 193 (Tex. 1966); *Elbaor*, 845 S.W.2d at 243; *Lochinvar, Corp.*, 930 S.W.2d at 187. 7n reviewing these contentions, this Court considers only the evidence and inferences tending to support the finding, disregarding all contrary evidence and inferences. *Wal-Mart Stores, Inc.*, 968 S.W.2d at 936.

The standard of review applied to consider a complaint that the trial court erred in denying a motion for new trial depends on the complaint preserved in the motion. *Hicks*, 834 S.W.2d at 590. A factual sufficiency challenge is governed by a factual sufficiency standard of review. *Id.* An allegation that damages are excessive invokes the same standard of review as any factual sufficiency challenge. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406 (Tex. 1998). Thus, we

apply a factual sufficiency standard of review in considering UP's twenty-ninth issue. In addressing a factual sufficiency challenge, this Court considers all of the evidence on the issue and will set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Cain*, 709 S.W.2d at 176.

Lost earning capacity is left to the discretion of the jury. *Strahan v. Davis*, 872 S.W.2d 828, 833 (Tex. App.-Wace 1994, writ denied). In Texas, where a plaintiff seeks damages for impairment of his earning capacity, he must prove the amount of such damages with the degree of certainty to which it is susceptible. *Crown Plumbing, Inc. v. Petrozak*, 751 S.W.2d 936, 939 (Tex. App.-Houston [14th Dist.] 1988, writ denied). The plaintiff must introduce evidence, in monetary terms, from which a jury may reasonably measure his loss of canning capacity. *Id.*

The proper measure of damages under PELA for the loss of future benefits is the present value thereof. *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485, 491, 36 S. Ct. 630, 632, 60 L. Ed. 1117 (1916). The way in which the jury is aided in determining present cash value is generally a matter to be determined by the law of the forum. *Id.* In Texas, the jury has the power to consider as proven any matter that is of common knowledge in the community. *Missouri Pac R.R. Co. v. Kimbrell*, 160 Tex. 542, 334 S.W.2d 283, 286 (1960). Interest rates and other forms of returns on money arc matters of common knowledge and jurors maybe presumed to be able to properly allow for those matters in estimating the present value of a sum of money payable in the future. *Id.* Accordingly, in Texas, no evidence of the earning power of money must be introduced. *Id.* The minimization of damages is a defensive matter and the burden of proving failure to mitigate is on the party who caused the loss. *Missouri Pac. R.R. Co. v. Whirehead*, 862 S.W. 632, 634 (Tex. App.-Tyler 1993, writ dism'd by agr.); *P.G. Lake, Inc. v.*

Sheffield, 438 S.W.2d 952, 956 (Tex. Civ. App.-Tyler 1969, writ ref'd n.r.e.).

Discussion

The record shows that Synar's 1995 UP wages were $50,535.13, his 1996 Up wages were $48,899.22, and his 1991 UP wages were $111,032.53.[2] Synar testified that he made about $2,500.00 a year doing paint and body work on cars. However, his 1996 income; taxes reflected income of only $400.00 for paint and body work in that year. Synar testified that at the time of the first surgery he was making 54400.00 per month. Synar testified that he could not return to work as a switchman, Dr. Slater testified that he would not release Synar to work as a switchman or brakeman. Dr. Slater also said that Synar is not completely disabled and that there are jobs he will be released to perform. Synar explained that he is taking computer classes and that after two years of additional schooling, he might make $10.00 to $12.00 an hour. In question six(h), the jury was asked what sum of money, if paid now in cash, would compensate Synar for loss of earning capacity that, in reasonable probability, will be sustained in the future. The jury answered $500,000.00.

The jury had before it evidence of Spar's past wages. It is uncontroverted that he cannot return to the job of switchman. As of the time of trial, he was retraining and the jury heard evidence regarding the rate of pay Synar expected in his new field. This is some evidence from which a jury could arrive at a figure for Synar's lost future earning capacity. *See Petrozak*, 751 S.W.2d at 939. No economic testimony was necessary for the jury to determine the present value of

---

[2] About $35,000 of his 1997 wabcs constitute payment for Synar's being on the "reserve board," a program through which a UP employee can draw Seventy percent of his regular pay although not working at his regular job. The remainder of the 1997 wages constitute payment for a different job Synar worked for UP in another location.

Synar's lost future earning capacity. *See Kimbrell*, 334 S.W.2d at 286. Accordingly, the trial court did not err in denying UP's motion for directed verdict on the issue of lost future earning capacity, submitting question six(b) to the jury, or refusing to disregard the jury's answer to question six(b). *See McLauglin*, 943 S.W.2d at 430. We overrule UP's issues twenty-five, twenty-six, twenty-seven, and twenty-eight.

The jury was provided specific information regarding Synar's wages up until the time he was no longer able to work as a switchman. Synar, who was forty-three years old at the time of trial, testified that he had intended to continue working for UP. Further, in calculating damages, the jury may assume that but for the injuries suffered, Synar would have continued to work and receive payment until retirement, disability, or death. *Atchison, Topeka and Santa Fe qty. Co. v. O'Merry*, 727 S.W.2d 596, 600 (Tex. App.-Houston [1st Dist.] 1987, no writ}. The jury may include damages to account for likely salary increases in the future. *See Roberson*, 25 S.W.3d at 258. The jury awarded Synar $500,000.00 for toss of future caring capacity. Synar was making $4400.00 a month at the time of the first surgery. The jury could infer from Synar's testimony that, after retraining, he could hope to make less than $2000 a month in his new career. Based on the evidence, the jury could have found that Synar's future earning capacity was diminished by $500,000.00. We cannot say that the jury's award is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust or that it is excessive. *See Cain*, 709 S.W.2d at 176. We overrule UP's twentyninth issue.

Pact Lost Wages

In its thirtieth issue, UP asserts that the trial court erred in denying its motion for new trial because the damages awarded were excessive. Alternatively, it asserts, the evidence is factually insufficient to support the damages awarded. UP does not specify in its brief which damages it is

now asserting are not supported by the evidence. We must carefully review the motion for new trial in order to decipher UP's actual complaint in this issue.

The only complaint of excessive damages in the motion for new trial was with regard to the award for lost future earning capacity. That issue was addressed in issue twenty-nine. Likewise, the factual sufficiency of the evidence to support the award for lost future earning capacity was addressed in issue twenty-nine. We need not reach the question of the factual sufficiency of the evidence to support the award for past medical expenses due to our disposition of issue seventeen. We note that a complaint about the factual insufficiency of the award for future medical expenses was not included in UP's motion for new trial and was therefore not preserved for review. *See* TEX. P. CIV. P. 324(b)(2). However, there would be no need to reach that question due to our disposition of issue eighteen. Accordingly, in spite of the heading in the brief under which issue thirty is argued, "Issues as to toss of Earning Capacity," the only question presented by issue thirty that remains for our review is the factual sufficiency of the evidence to support the jury's award of past lost wages.

Applicable Law

In addressing this challenge, we consider all the evidence on the issue and set aside the award only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Cain*, 709 S.W.2d at 176. In an FELA action, the plaintiff is entitled to recover lost wages, if proven. *See Roberson*, 25 S.W.3d at 258; *O'Merry*, 727 S.W.2d at 599.

Discussion

The evidence shows that Synar worked until his first surgery which was on July 27, 1998. He did not work again

until the end of November that same year. Accordingly, he missed approximately four months o f work in 1998. Dr. Slater testified that after examining Synar on January 29, 1999, Synar was "taken off work," The trial was held in mid-July of 1999. Thus, Synar missed five and one half months of work before the trial in 1999. Synar testified that at the time of the first surgery, he made $4400.00 a month. This evidence supports the jury's award of $41,304.00 for past lost wages. *See Roberson*, 25 S.W.3d at 258; *O'Merry*, 727 S.W.2d at 599. We overrule UP's thirtieth issue.

UP's Requested Instruction Number Nineteen

In its brief, UP listed issues twenty-five through thirty under the heading "Issues as to Loss of Earning Capacity" and combined its argument for all six issues. The entire argument under this heading, addressing all six issues, is comprised of twenty-two lines of text. The last four of those lines of text do not address issues twenty-five through thirty, which are all sufficiency complaints, In the last four lines, UP complains that the trial court erred in not granting its requested instruction number nineteen The entire argument consists of the statement that the jury should have been informed as to the definition of earning capacity. A party who presents its complaints to the appellate court in this multifarious and perfunctory manner, disregarding the Rules of Appellate Procedure, risks waiver. *See Harris County v. Smoker*, 934 S.W.2d 714, 718 (Tex. App.-Houston [1st Dist.] 1996, writ denied). We shall, however, in the interest of justice, address this complaint.

UP's requested instruction number nineteen is as follows: "Recovery for lost earning capacity is not based upon actual earnings lost, but on the loss of capacity to earn money," It is followed by a cite to *Southern Pacific Transportation Co. v. Harlow*, 729 S.W.2d 946 (Tex. App.-Corpus Christi 1987), *writ denied*, 745 S.W.2d 320 (Tex.1988). While the phrase

"earning capacity' is used in question six, the charge includes no definition or instruction explaining the meaning of that term.

In *Harlow*, the case UP reties on in support of its requested instruction, the appellants complained that the jury award for the plaintiffs loss of earning capacity in the future was not supported by the evidence. Before reviewing the evidence, the Corpus Christi court of appeals set out the applicable law, including the above quoted statement of the law that constituted UP's requested instruction. The *Harlow* opinion did not set out a definition of the term "earning capacity." Earning capacity has been defined as the "ability and fitness to work in gainful employment for any type of remuneration, including salary, commissions, and other benefits, whether or not the person is actually employed. It does not necessarily mean actual wages, income, or other benefits received during the period inquired about." *Baccus v. American States Ins. Co. of Texas*, 865 S.W.2d 587, 588 (Tex. App.-Fort Worth 1993, no writ); *Home Indent. Co. v. Eason*, 635 S.W.2d 593, 594-95 (Tax, App,-Houston [14th Disc.) 1982, no writ). *Harlow* does not stand for the proposition that the trial court should give a definition of "earning capacity' to the jury. UP did not submit a requested definition of the term "earning capacity." Therefore, its complaint on appeal that "[t]he jury should have been informed as to the definition of earning capacity," has not been preserved. See TEX. R. APP. P. 33.1.

Applicable Law

The trial court should submit instructions only when it determines that the instructions will help the jury understand the law, *City of Austin*, 844 S.W.2d at 794. A trial court has wide latitude to determine the sufficiency of explanatory instructions and definitions. *Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 791(Tex.1995). We consider whether the

requested instruction was reasonably necessary to enable the jury to render a proper verdict. *Id.* at 790.

Discussion

The requested instruction is a correct statement. However, as it does not actually explain what lost earning capacity is, the trial court could have determined that it would not help the jury understand the law. We conclude that UP's requested instructions number nineteen was not reasonably necessary to enable the jury to render a proper verdict *See Plainsmen Trading Co.*, 898 S.W.2d at 790. As the trial court did not abuse its discretion in refusing to submit UP's requested instruction number nineteen, we overrule UP's final complaint under issues twenty-five through thirty.

CONCLUSION

Due to the disposition of the above issues, we need not reach UP's issues nineteen, twenty, twenty-one, and thirty-one. *See* TEX. R. APP. P. 47.1.

The jury awarded Synar $41,300.00 for lost past wages, $500,000.00 for lost earning capacity, $15,473,10 for past medical expenses, and $10,000.00 for future medical expenses. Had the trial court not disregarded the jury's finding that UP violated the FSAA, the total award would have been $566,773.10. The trial court subtracted thirty percent, or $170,031.93, for a total award of $396,741.17. We determine that the jury's findings that UP is liable for $15,473.10 in past medical expenses and for $10,000.00 in future medical expenses cannot stand. Accordingly, UP is liable for the $500,000.00 award for lost earning capacity and the $41,300.00 award for lost past wages, a total o f $541,300.00. Because the trial court erred in disregarding the jury's answer to question four, we reinstate the jury's affirmative answer finding UP liable under the FSAA. As a

result, applying section 53 of the FELA, the jury's total award is not diminished by thirty percent.

We reverse the portion of the judgment awarding Synar damages for past medical expenses arid future medical expenses and render judgment that Synar take nothing on his claims for past and future medical expenses. We delete that portion of the judgment awarding Synar $396,741,17 and render judgment in favor o f Synar in the amount of $541,300.00 with post-judgment interest at ten percent per annum from the date of the trial court's judgment. As modified, the trial court's judgment is *affirmed*.

SAM GRIFF
Justice

Opinion delivered October 17, 2001,
Panel consisted of Davis, C.J., Worthen, J., and Griffith, J.

(DO NOT PUBLISH)